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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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NORTH AMERICAN DREDGING COMPANY OF NEVADA, a Corporation, and CITY OF RICHMOND, a Municipal Corporation,  
Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Appellees.

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**Transcript of Record.**

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Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

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**Filed**

JAN 18 1917

**F. D. Monckton,**  
Clerk.



**United States**  
**Circuit Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Subpoena Ad Respondendum.**

UNITED STATES OF AMERICA.

*District Court of the United States, Northern District of California, Second Division.*

IN EQUITY.

The President of the United States of America,  
Greeting, to North American Dredging Company of Nevada, a Corporation.

YOU ARE HEREBY COMMANDED, that you be and appear in said District Court of the United States, Second Division, aforesaid, at the courtroom in San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said court by Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, who are citizens of the State of California, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 14th day of May, in the year of our Lord one thousand nine hundred and fifteen and of our Independence the 139th.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the clerk's office of said court, pursuant to said Bill; otherwise the said Bill [1\*] may be taken *pro confesso*.

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

**Return on Service of Writ.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named North American Dredging Company of Nevada, a corporation, by handing to and leaving a true and attested copy thereof with R. A. Perry, manager of the North American Dredging Company of Nevada, a corp., personally at Oakland, California, in said District on the 15th day of May, A. D. 1915.

J. B. HOLOHAN,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy.

[Endorsed]: Filed May 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

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\*Page-number appearing at foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

**Bill in Intervention of City of Richmond.**

Now comes the city of Richmond, a municipal corporation, and by leave of this Honorable Court intervenes in the above-entitled action, and files this its bill of intervention and alleges:

I.

That the city of Richmond, intervenor herein, is now and for more than five years last past has been a municipal corporation in the county of Contra Costa, State of California.

II.

That there now exists, and for more than twenty years last past there has existed, wholly within the limits of the said city of Richmond, a certain navigable channel which extends from San Pablo Bay in a northerly direction for a distance of about five thousand (5,000) feet; that said channel is a natural arm of said San Pablo Bay, which said San Pablo Bay is a navigable body of water within the State of California; that said channel is and during all the times herein mentioned has been of an average width of about one hundred (100) feet; that the depth of water in said channel varies with the rise and fall of the tide, and that an ordinary low tide said channel has a minimum depth of two (2) feet, and at ordinary high tide has a minimum depth of eight (8) feet; that said channel, which is known and designated as the South channel of the San Pablo Canal has for many years last past been navigated from San Pablo Bay to its northern extremity by

vessels both sail and steam, and has been during said time used for the purpose of conveying rock, gravel and merchandise of various kinds from other ports and places to the city of Richmond. That in order to improve the navigability of said channel and to render it more suitable for purposes of navigation and commerce, it became and is necessary to deepen said channel throughout its [3] entire length and to a width of eighty (80) feet, to a depth of eight (8) feet at ordinary low tide.

That the city of Richmond has a population of 20,000 or upwards, and contains within its limits a large number of extensive manufacturing plants and industries; that it is essential for the best interests of the city of Richmond, its inhabitants and the public generally, that the navigability of said channel be improved and increased as aforesaid, thereby affording better transportation facilities for the city of Richmond, its inhabitants and the public generally.

### III

That heretofore, on the 2d day of July, 1914, the city of Richmond, upon due and proper application therefor, received from the War Department of the United States permission to improve the navigability of said channel by deepening the same as aforesaid.

That after proceedings duly and regularly had and taken, and after due and proper notice by publication calling for bids for the deepening of said channel, a contract for the improvement of said channel as aforesaid, was duly let by the city of Richmond to North American Dredging Company

of Nevada, a corporation, defendant herein, which said contract is now and ever since said last-mentioned date has been in full force and effect.

That if the relief asked for by plaintiffs in their bill filed in the above-entitled action, is granted, this intervenor will be greatly injured and damaged in this: that it will be unduly limited in its transportation and commercial facilities and its inhabitants, and the public generally will be deprived of a safe and convenient means of transporting freight and passengers between the city of Richmond and adjacent and other ports and places.

#### IV.

That for all the reasons above stated, said city of Richmond asserts and alleges that its interest in the subject matter embraced in the said bill in the above-entitled action is such that [4] it will suffer great loss and injury if it is not permitted to become a party to said action by this its bill in intervention.

#### V.

That William Mintzer was not at the time of his death, or at any other time, seized or possessed, or entitled to the seizin or possession of the lands and premises described in paragraph V of plaintiffs' bill, or any part thereof, nor since the 28th day of November, 1911, or since any other time or at all, have plaintiffs or either of them as the executor and executrix, or executor or executrix, of the last will and testament of William Mintzer, deceased, or otherwise, been or now are possessed or entitled to the possession of the lands described in said paragraph V of plaintiffs' bill or any part or portion thereof.



## VI.

That this intervenor admits that on or about the month of April, 1915, defendant placed some small wooden bents on the property described in paragraph V of plaintiffs' bill, and strung high-power electric wires thereon, and in this behalf intervenor alleges that said bents were placed immediately adjacent to said south channel of San Pablo Canal and temporarily and necessarily for the purpose of carrying out its said contract with intervenor for the dredging of said channel.

## VII.

That defendant has not brought a dredger in and upon, or in or upon said property, or any property of plaintiffs, or has not without right, or against the objections of plaintiffs, have begun to cut, dredge and excavate, or to cut, or dredge, or excavate, a ditch or canal eighty (80) feet in width and eight (8) feet in depth below low tide, or of any other width or depth whatsoever, or have carried away from plaintiffs' property the or any dirt or soil from said ditch or canal so cut, dredged and excavated; and in this behalf this intervenor alleges that pursuant to its said [5] contract with this intervenor the defendant about the 21st day of April, 1915, brought a dredger into and through said south channel of San Pablo Canal to the northerly end thereof, and since on or about the 30th day of April, 1915, and until stopped by the injunction and order of this Court, began to dredge and deepen said canal to a depth of eight (8) feet below ordinary low tide, but that said dredging and excavating has been done en-

tirely within the natural banks of said channel with the exception of a short distance where said channel has been widened for a distance of from ten (10) to thirteen (13) feet; that none of the dredging or excavating done as aforesaid was within the boundaries of any land claimed, owned or possessed by plaintiffs, and in this behalf intervenor alleges that all dredging and excavating done in said channel up to the time of the service of the restraining order issued out of this court was done wholly within lands claimed and possessed by the Richmond Belt Railway Company, a corporation.

That defendant has not threatened to or is proceeding to or will unless prevented by the order of this Court, proceed to cut, dredge or excavate said or any ditch or canal eighty (80) feet wide and eight (8) feet in depth, or will dredge or excavate any ditch or canal of any width or depth on any land belonging to plaintiffs; and in this behalf your intervenor alleges that the said defendant will not, nor will your intervenor under its contract with the said defendant, cut, dredge and excavate, or cut or dredge or excavate, or cause or permit to be cut, dredged or excavated, any ditch or canal on, in or through any lands owned by plaintiffs, but that all of said work agreed to be done by said defendant for your intervenor under said contract will be done in, upon and through said navigable channel known as and called the south channel of the San Pablo Canal. That the only dirt or soil carried away has been the dirt and soil excavated from the bottom of said channel, which said earth and soil so excavated has [6]

been placed behind bulkheads on lands adjacent to said channel, in accordance with the requirements of the said permit issued by the War Department of the United States for the dredging of said channel.

That defendant is not threatening to or proceeding to carry away from plaintiffs' property any dirt or soil whatsoever; that plaintiffs will not, unless defendant is restrained by the order of court from any acts alleged in said bill, suffer irreparable or any loss or damage; that none or any acts of defendant constitute a continuing or other wilful and malicious, or wilful or malicious trespass upon the or any property of plaintiffs, or wilful or malicious waste; that plaintiff has not suffered any loss and damage, or loss or damage by any acts of defendant; that the amount of loss and damage, or loss or damage, does not amount to, or will not amount to twenty thousand dollars (\$20,000) or any other sum or amount whatsoever. Denies that plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, said city of Richmond, intervenor, prays that the temporary injunction heretofore issued in this action be dissolved and that plaintiffs take nothing by their said action, and for such further relief as may be proper in the premises.

D. J. HALL,

Solicitor for Intervenor.

State of California,

County of Contra Costa,—ss.

E. J. Garrard, being first duly sworn, deposes and says: That he is a member of the council of the city of Richmond and mayor of said city of Richmond,



intervenor named in the above-entitled cause. That he has heard read the foregoing bill in intervention and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are [7] therein stated upon his information or belief, and as to those matters that he believes it to be true.

E. J. GARRARD.

Subscribed and sworn to before me this 31st day of May, 1915.

[Seal]

C. A. ODELL,

Notary Public in and for the County of Contra Costa, State of California.

[Endorsed]: Filed June 14, 1915. Walter B. Maling, Clerk. [8]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

IN EQUITY—No. 184.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY  
OF NEVADA (a Corporation),

Defendant,

CITY OF RICHMOND (a Municipal Corporation),  
Intervenor.

**Answer of Plaintiffs to Bill in Intervention of the  
City of Richmond, a Municipal Corporation, In-  
tervenor, and Motion to Dismiss.**

Now come Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, plaintiffs in the above-entitled action, and move the Court to dismiss the Bill of Intervention of the city of Richmond, a municipal corporation, on the ground that said Bill of Intervention is wanting in equity, and on the further ground that it does not disclose any cause of action or cause of intervention in the matter of the action above entitled; and also upon the further ground that it appears from said Bill of Intervention that the said city of Richmond, a municipal corporation, intervenor herein, is a citizen of the same State as the plaintiffs herein, to wit, the State of California. [9]

And now come Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, the above-named plaintiffs, and without waiving their motion to dismiss the Bill of Intervention of the city of Richmond, a municipal corporation, intervenor, for their answer to said Bill of Intervention of said city of Richmond, a municipal corporation, deny that there now exists, or for more than twenty years last past, or at any time or at all, there has existed, wholly within the limits of the said city of Richmond, or otherwise or at all, a certain or any navigable channel which is alleged extends from the San

Pablo Bay in a northerly direction for a distance of about five thousand (5,000) feet, or any distance whatsoever or at all, or that said alleged channel is a natural or any arm of said San Pablo Bay, or at all, or that said alleged channel is, or during all the times in the Bill of Intervention mentioned has been, of an average width of about one hundred (100) or any feet, or at all, or that the depth of water in said alleged channel or at ordinary low tide said alleged channel has a minimum depth of two (2) or any feet, or at ordinary high tide has a minimum depth of eight (8) or any feet, or that said alleged channel, or which is known or designated as the South Channel of the San Pablo Canal, has been for many or any years last past navigated from San Pablo Bay to its northern extremity by vessels both sail or steam or otherwise or at all, or has been during said time or at all used for the purpose of conveying rock or gravel or merchandise of various or any kinds from other ports or places to the city of Richmond, or at all, or that in order to improve the [10] navigability of said channel or to render it more suitable for the purposes of navigation or commerce, it became or is necessary to deepen said channel throughout its entire length or to a width of eighty (80) feet or to a depth of eight (8) feet at ordinary low tide or otherwise or at all.

Deny that it is essential for the best interests of the city of Richmond, or its inhabitants, or the public generally, that the navigability of said channel be improved or increased, or thereby afforded better transportation facilities for the city of Richmond,

or its inhabitants or the public generally.

And in this connection plaintiffs allege that the only corporation or person in the city of Richmond, or elsewhere, that would derive any benefit from the said alleged deepening of the said alleged channel in any way would be the Standard Oil Company of California, a corporation organized and existing under and by virtue of the laws of the State of California, and having its refining plant in said city of Richmond south of said alleged channel alleged to be called the South Channel of San Pablo Canal.

Plaintiffs state that they have no information or belief sufficient to enable them to answer, and placing their denial upon said ground, plaintiffs deny that on the 2d day of July, 1914, or at any time or at all, the city of Richmond upon due or proper application therefor received from the War Department of the United States permission to improve the navigability of said alleged channel by deepening the same as aforesaid, or that after proceedings duly or regularly had or taken, or otherwise or at all, or after due or proper notice by publication calling for bids for [11] the deepening of said alleged channel or otherwise or at all, a contract for the improvement of said alleged channel was duly or at all let by the city of Richmond to North American Dredging Company of Nevada, a corporation, defendant herein, or that said alleged contract is now, or ever since said last-mentioned date has been, in full or any force or effect, or otherwise or at all.

These plaintiffs deny that if the relief asked for by plaintiffs in their amended bill filed in the above-

entitled action is granted, the intervenor will be greatly or at all injured or damaged, or that it will be unduly or at all limited in its transportation or commercial facilities, or that its inhabitants or the public generally will be deprived of a safe and convenient means of transporting freight or passengers between the city of Richmond or adjacent or other ports or places, or otherwise or at all, or that for all or any of the reasons above stated, the interests of the city of Richmond in the subject matter embraced in the said Amended Bill in the above-entitled action will suffer great or any loss or injury if it is not permitted to become a party to said action by its Bill of Intervention, or otherwise or at all.

And in this connection plaintiffs allege that they are informed and believe, and therefore according to and upon their said information and belief state, that the intervenor herein, city of Richmond, a municipal corporation, and the Standard Oil Company of California, a corporation organized and existing under and by virtue of the laws of the State of California, on or about the 6th day of April, 1915, entered into an agreement whereby it was agreed that the [12] city of Richmond should cause the dirt or soil dredged or taken from the property of plaintiffs to be deposited upon the property of the Standard Oil Company of California, and that it should pay to the city of Richmond ten and 74/100 cents per cubic yard therefor, that being the exact price that the city of Richmond agreed to pay the defendant herein, North American Dredging Company of Nevada for dredging said alleged channel as aforesaid, and that the aim



and puruouse of said agreement between the Standard Oil Company and the city of Richmond was that the Standard Oil Company should pay for said dredging, and thereby receive and obtain the property of plaintiffs without paying them therefor.

That if said alleged channel is deepened in accordance with the agreement between the city of Richmond and the North American Dredging Company of Nevada, a corporation, defendant herein, it will enable the Standard Oil Company of California to obtain a water-way to the San Pablo Bay over and across and upon the land and property of plaintiffs.

That plaintiffs are informed and believe, and therefore upon and according to their said information and belief state, that it is the intention of the city of Richmond, a municipal corporation, intervenor herein, to use the alleged channel after deepening the same as an open sewer through the land and property of the plaintiffs to the San Pablo Bay, and to deposit the sewage from the city of Richmond in the said alleged channel as aforesaid, thereby constituting a public nuisance. [13]

WHEREFORE, the said plaintiffs ask that the prayer of the intervenor be denied, and for such other and further relief as may be meet and proper in the premises.

J. K. JOHNSON,  
Solicitor for Plaintiffs. [14]

State of California,  
City and County of San Francisco,—ss.

Lucio M. Mintzer, being duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read Answer to the Bill in Intervention of the city of Richmond, a municipal corporation, and knows the contents thereof; that the same is true of his own knowledge; except as to matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

LUCIO M. MINTZER.

Subscribed and sworn to before me this 1st day of July, 1915.

[Seal]

HENRIETTA HARPER,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 1, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

IN EQUITY—No. 184.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY  
OF NEVADA, (a Corporation),  
Defendant.

CITY OF RICHMOND (a Municipal Corporation),  
Intervenor.

**Amended Bill for Injunction and Accounting.**

To the Honorable, the Judges of the District Court  
of the United States, in and for the Northern  
District of California:

Lucio M. Mintzer and Mauricia T. Mintzer, citizens of the State of California, residing at the city and county of San Francisco, executor and executrix of the last will and testament of William Mintzer, deceased, lately a citizen of the State of California, residing in the city and county of San Francisco, by leave of Court first had and obtained bring this their amended bill against North American Dredging Company of Nevada, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and having its principal office at Carson City, in the State of Nevada, and an inhabitant of the District of Nevada, and allege and say:

Second. That this suit is between citizens of different States, viz.: the plaintiffs, Lucio M. Mintzer and Mauricia T. Mintzer, citizens of the State of California as executor and executrix aforesaid, and the defendant, North American Dredging Company of Nevada, a corporation, a citizen of the State of Nevada; and that the amount in controversy herein exceeds the sum or value of three thousand dollars (\$3,000), exclusive of [16] interest and costs. The actual damages claimed by plaintiffs against defendant are twenty thousand dollars (\$20,000), and they also ask exemplary or punitive damages for wilful and malicious trespass and waste.

Third. The defendant, North American Dredg-



ing Company of Nevada, is, and at all the times herein named was, a corporation organized and existing under and by virtue of the laws of the State of Nevada.

Fourth. That William Mintzer, deceased, died testate at the city and county of San Francisco, on or about the 10th day of November, 1911. That he was a resident of the city and county of San Francisco, State of California, at the time of his decease. That after proceedings thereunto regularly had, his last will and testament was duly and regularly admitted to probate by the Superior Court of the city and county of San Francisco on the 28th day of November, 1911, and the plaintiffs, named therein were appointed executor and executrix thereof; that plaintiffs qualified as such executor and executrix, and letters testamentary were issued to them on said 28th day of November, 1911. That these letters have never been revoked, and ever since the said 28th day of November, 1911, plaintiffs have been and now are the duly appointed, qualified and acting executor and executrix of the last will and testament of William Mintzer, deceased.

Fifth. That William Mintzer at the time of his decease was seized and possessed, and entitled to the seisin and possession, and ever since the 28th day of November, 1911, the said plaintiffs, as the executor and executrix of the last will and testament of William Mintzer, deceased, have been and now are possessed, and entitled to the possession, of all that certain land and real property situated in the county of Contra Costa, State of California, and described as

being a portion of Survey No. 190, Swamp and Overflowed Lands in S.  $\frac{1}{2}$  Sections 10 and 11, [17] W.  $\frac{1}{2}$  Section 14, N.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$  Section 14, and E.  $\frac{1}{2}$  Section 15, all in Township 1 N., R. 5 W., Mount Diablo Base and Meridian, and containing 342.10 acres more or less.

Also all of the salt marsh and tide land which lies upon the westerly side of a certain slough or tide creek known as "Peter Davis Creek" situated in Contra Costa County and which is embraced in Survey No. 5 of Contra Costa County for State salt marsh and tide lands. Said lands being more particularly described as follows, to wit:

The fractional S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 2, and the West  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of Section Eleven (11) in Township 1 North, Range 5 West, Mount Diablo Meridian.

Also Surveys No. 6 and 7 State Tide Lands, Contra Costa County, Township No. 1 North, Range No. 5 West, Mount Diablo Meridian; Section No. 3; and 10 being the fractional S. E.  $\frac{1}{4}$ , fractional S. W.  $\frac{1}{4}$  of Section 3 and fractional N. E.  $\frac{1}{4}$  and fractional N. W.  $\frac{1}{4}$  of Section 10, more particularly described in field-notes of said survey as follows: All the tide land lying between the U. S. meander-line and the shore of San Pablo Bay in the southwest quarter of Section Three and in the northwest quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing Thirty-eight  $\frac{2}{100}$  acres; and all the tide land lying between the U. S. meander-line and San Pablo Bay and Slough in the southeast quarter of Section Three, and in the north-

east quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing one hundred and eighty-seven 71/100 acres, and containing in both surveys two hundred and twenty-five 72/100 acres, being more fully described in tide land surveys 6 and 7, Contra Costa County .

Sixth. That in or about the month of April, 1915, defendant without right and against the objections of plaintiffs placed [18] poles on said property, and strung high-power electric wires thereon, and brought a dredger in and upon said property, and without right and against the objections of plaintiffs have begun to cut, dredge and excavate a ditch or canal eighty feet wide and eight feet in depth below low tide, and have carried away from plaintiffs' property the dirt or soil from said ditch or canal so cut, dredged and excavated, and threaten to, and are proceeding to, and unless prevented by the order of Court, will proceed to cut, dredge and excavate said ditch or canal eighty feet wide and eight feet in depth below low tide for a distance of between four thousand and five thousand feet in length across the said property of plaintiffs, and to carry away from plaintiffs' property the dirt or soil so cut, dredged and excavated, and unless defendant is restrained by the order of Court from said acts, the plaintiffs will suffer irreparable loss and damage by the said acts of defendant. That said acts of defendant constitute a continuing wilful and malicious trespass upon the property of plaintiffs, and wilful and malicious waste of a portion thereof.

Seventh. That plaintiffs have suffered loss and

damage by the said acts of defendant, and the amount of said loss and damage suffered by the acts of defendant amounts to, and will amount to, the sum of twenty thousand dollars. (\$20,000).

Eighth. That plaintiffs have no plain, speedy and adequate remedy at law.

WHEREFORE, plaintiffs pray for an injunction restraining defendant, its officers, agents, employees and servants, from committing the acts complained of in the plaintiffs' amended bill in cutting, dredging and excavating said ditch or canal and carrying away the dirt and soil from [19] plaintiffs' property, and for a temporary injunction *pendente lite*, and for a restraining order.

For an accounting of the loss and damage suffered by plaintiffs by the acts of defendant.

For such other and further order as may be meet and proper, and for general relief and for costs.

J. K. JOHNSON,  
Solicitor for Plaintiffs.

State of California,  
City and County of San Francisco,—ss.

Lucio M. Mintzer, being duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Amended Bill, and knows the contents thereof; that the same is true of his own knowledge.

LUCIO M. MINTZER.

Subscribed and sworn to before me this 1st day of July, 1915.

[Seal]                      HENRIETTA HARPER,  
Notary Public in and for the City and County of San  
Francisco, State of California.

[Endorsed]: Filed Jul. 1, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

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*In the District Court of the United States for the  
Northern District of California, Second Divi-  
sion.*

IN EQUITY—No. 184.

LUCIO M. MINTZER and MAURICIA T. MINT-  
ZER, as Executor and Executrix of the Last  
Will and Testament of WILLIAM MINT-  
ZER, Deceased,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY  
OF NEVADA, (a Corporation),

Defendant,

CITY OF RICHMOND (a Municipal Corporation),  
Intervenor.

**Answer of North American Dredging Company of  
Nevada (a Corporation) to Amended Bill.**

Now comes the North American Dredging Com-  
pany of Nevada, a corporation, the defendant in the  
above-entitled action, and answering the Amended  
Bill for Injunction of plaintiffs on file herein, denies:

First. That said William Mintzer at the time of  
his decease, or ever or at all, was seized or possessed  
or entitled to the seisin or possession of the land de-  
scribed in said Amended Bill, or any part or portion  
of said land; and said defendant denies that ever  
since the 28th day of November, 1911, or any other



date, or ever or at all, said plaintiffs or either of them, either as the executor or executrix of the last will and testament of William Mintzer, deceased, or individually or otherwise, have been, or ever were, or now are possessed or entitled to the possession of the land described in said Amended Bill, or any part or portion of said land, or any interest therein.

And in this connection said defendant alleges that at all times herein mentioned, and for a long time prior thereto, there has existed and now exists over and through a portion of the real property described in said Amended Bill, a certain channel and water-way known and designated as the south channel of the San [21] Pablo Canal, all within the city limits of the city of Richmond, county of Contra Costa, State of California, and that said channel is and has been for many years last past, a navigable water-way, with a public terminus, connecting the said city of Richmond with the San Pablo Bay and the bay of San Francisco; and that at all times herein mentioned, and for many years last past said canal has been and is now a navigable water-way, and that for many years last past vessels engaged in commerce have navigated and traversed said channel; and said defendant alleges that at no time mentioned herein, or in said Amended Bill mentioned, did the plaintiffs or their testator, or either or any of them, ever have title to the land covered by the waters of said channel; and that on or about the 15th day of March, 1915, the said defendant duly entered into a contract in writing with said city of Richmond, a copy of which said contract is hereto attached, marked Exhibit "A," and is hereby referred to and

made a part hereof for all intents and purposes, the same as if set forth herein at length. That by the terms of said agreement in writing the said defendant agreed to dredge a channel eighty (80) feet wide, in and through said south channel of said San Pablo Canal, to a uniform depth of eight (8) feet below low tide, and that said work of dredging said channel under and in accordance with the terms of said contract, was commenced by said defendant on or about the 21st day of April, 1915, for the purpose of improving said water-way in the interest of commerce and navigation, by deepening the bed of said channel without altering or changing the banks or course of said channel, which channel has a public terminus, so that the navigability of said channel will be improved, and so that said channel will be navigable at all times for vessels engaged in commerce, of deeper draft than vessels which can now navigate said channel.

Second. Said defendant denies that in the month of April, [22] 1915, or at any other time, or ever or at all, said defendant, without right or against the objections of plaintiffs, or either of them, placed poles on any property of plaintiffs, or either of them, or strung high-power electric wires or any wires on any property of plaintiffs, or either of them.

Third. Said defendant denies that in the month of April, 1915, or ever or at all, said defendant brought a dredger in or upon the property described in the Amended Bill, or any part or portion thereof, except as hereinafter stated; and said defendant denies that said defendant, without right or against

the objections of plaintiffs, or either of them, began to cut or dredge or excavate a ditch or canal eighty (80) feet wide or eight (8) feet in depth, below low tide, except as hereinafter stated; and said defendant denies that said defendant has carried away from plaintiffs' property any dirt or soil; and said defendant denies that said defendant threatens to or will or is proceeding to or will, unless prevented by the order of the Court, proceed to cut or dredge or excavate said or any ditch, or canal, eighty (80) feet wide or eight (8) feet deep, or of any other dimensions, for a distance of between four and five thousand feet across said or any property of plaintiffs, except as hereinafter stated; and said defendant denies that said defendant will carry away from any of plaintiffs' property any dirt or soil cut or dredged or excavated, except as hereinafter stated; and said defendant further denies that plaintiffs or either of them have suffered any irreparable or any loss or damage by any acts of defendant; and said defendant denies that it has committed any wilful or malicious or any trespass upon any property of plaintiffs, or either of them, or any wilful or malicious waste of any portion or any of plaintiffs' property, or of any property of either of plaintiffs; and said defendant denies that it will, unless restrained [23] by order of Court, do or perform any act or thing which will cause plaintiffs, or either of them, to suffer any irreparable or any other loss or damage; and said defendant denies that it will, unless restrained by order of the Court, perform any acts, constituting a continuing wilful or malicious or any other



trespass upon any property of plaintiffs or either of them; and said defendant denies that it will, unless restrained by order of this Court, do or perform any acts or act which will constitute a wilful or malicious or any other waste of any portion of any property of plaintiffs or either of them.

And in this connection said defendant alleges and avers that on or about the 21st day of April, 1915, pursuant to a notice from the city engineer of the city of Richmond, and in accordance with the terms and provisions of the aforesaid contract, the said defendant in performance of the work under the aforesaid contract, with a ten horse-power gasoline launch, drawing about five (5) feet of water, towed up the south channel of the San Pablo Canal from the Bay of San Francisco and the San Pablo Bay, and to the extreme southerly end of said channel, in the city of Richmond, a hydraulic suction dredge called the Wilmington, drawing about four (4) feet of water, and having a hull twenty-eight (28) feet wide by seventy-four (74) feet in length, and equipped with a fifteen (15) inch suction pump and a six hundred and fifty (650) horse-power motor. That said channel runs through a portion of the lands described in the Amended Bill, and is a navigable water-way having a public terminus, and connecting the city of Richmond with San Pablo Bay, and the bay of San Francisco; and that said channel and water-way has been for many years last past, and is now navigated by vessels engaged in commerce. That the work heretofore performed and to be performed by defendant, is the improving of said water-way by deepening the

bed of said channel without altering or changing the banks [24] or course of said channel, except in one place where one of the banks of said channel was cut for a distance of ten to thirteen feet, so that the navigability of the same will be improved, and so that said channel will at all times be navigable for vessels engaged in commerce, and drawing more water than the vessels which can now navigate said channel; and that on or about the 30th day of April, 1915, said defendant commenced to operate said dredge, and to dredge earth and material from the bed of said channel to a depth of nine (9) feet below mean low water, and to discharge earth and material from the bed of said channel behind suitable bulk-head upon the lands immediately south of the southerly end of said channel.

Fourth. Said defendant denies that plaintiffs, or either of them, have suffered any loss or damage whatsoever by any acts of said defendant, or that plaintiffs, or either of them, will suffer any loss or damage whatsoever by any contemplated acts or act of defendant; and said defendant denies that the amount of any loss or damage alleged to have been suffered, or suffered by any acts or act of defendant will be or will amount to the sum of twenty thousand (20,000) dollars, or any other sum or amount whatsoever.

Fifth. Said defendant alleges that plaintiffs and each of them have a plain, speedy and adequate remedy at law if any right or rights of plaintiffs, or either of them, have been interfered with; and said defendant denies that unless restrained or en-

joined by the process of this Court, any damage will be committed or that any act or acts of defendant have caused or will cause plaintiffs, or either of them, any irreparable or any loss or injury, or that plaintiffs, or either of them, will suffer irreparable or any loss or injury by any contemplated acts of defendant, or by any acts or act of defendant.

Sixth. And further answering said Amended Bill, defendant alleges that while proceeding with said work of dredging from [25] the bed of said channel in said water-way, and after it had been dredging from said channel for sixteen (16) days, and after it had dredged therefrom approximately twenty-two thousand (22,000) cubic yards of material, pursuant to the aforesaid contract, the said defendant was served on May 15, 1915, with a temporary restraining order issued out of this court, commanding said defendant to stop work on said improvement, and that said defendant, pursuant to said order, stopped work on said improvement on May 15, 1915, and has ever since discontinued work under said contract. That said defendant has suffered damage thereby at the rate of two hundred and fifty (250) dollars per day from the 15th day of May, 1915, to the date of the filing of this answer, and will continue to suffer damage thereby at the rate of two hundred and fifty (250) dollars per day from the date of the filing of this answer to the date of the hearing of this cause. That at the time said restraining order was served, as aforesaid, defendant was operating in said channel the aforesaid hydraulic suction dredge, which dredge was capable

of dredging four thousand (4000) cubic yards of material from said channel daily, and that said dredge has an earning capacity of four hundred and thirty (430) dollars per day. That by reason of the temporary restraining order, order to show cause, and temporary injunction issued herein, said defendant has suffered, and is sustaining loss and damage to the extent of two hundred and fifty (250) dollars or thereabouts per day.

WHEREFORE, defendant prays that said temporary injunction *pendente lite* be dissolved and that plaintiffs be denied any relief, and that defendant have judgment against plaintiffs for all loss and damage suffered and sustained by it by reason of said temporary restraining order, order to show cause, and temporary injunction *pendente lite*, issued herein, and for costs of suit and for such other and further relief as may be meet and proper in the premises. [26]

NORTH AMERICAN DREDGING COM-  
PANY OF NEVADA,

[Seal]

By W. L. PAULSON,  
Secretary,

Defendant.

EARL D. WHITE,  
Solicitor for Defendant.

State of California,  
County of Alameda,—ss.

W. L. Paulson, being duly sworn, deposes and says: That he is an officer, to wit, the secretary of North American Dredging Company of Nevada (a corporation), the defendant named in the above-entitled ac-

tion; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and that as to those matters he believes it to be true.

W. L. PAULSON.

Subscribed and sworn to before me this 12th day of July, 1915.

[Seal]

ELEANOR RUSSELL,

Notary Public in and for the County of Alameda,  
State of California.

I hereby certify that the foregoing answer is, in my opinion, well founded in point of law.

Dated July 12th, 1915.

EARL D. WHITE,

Solicitor for Defendant. [27]

**Contract, March 15, 1915, Between City of Richmond,  
etc., and North American Dredging Company.**

**CONTRACT.**

Richmond, Contra Costa County,  
California.

**CONTRACT AND SPECIFICATIONS FOR THE  
DREDGING OF THE SOUTH CHANNEL OF  
SAN PABLO CANAL, FROM THE NORTH-  
ERLY LINE OF THE PROPERTY OF THE  
STANDARD OIL COMPANY TO SAN PABLO  
CANAL, IN THE CITY OF RICHMOND,  
COUNTY OF CONTRA COSTA, STATE OF  
CALIFORNIA, AND ALL AS DESCRIBED**



AND SHOWN IN AND UPON THE CONTRACT, SPECIFICATIONS AND PLANS FOR THE WORK ON FILE IN THE OFFICE OF THE CLERK OF THE CITY OF RICHMOND, AND WHICH ARE MADE A PART HEREOF.

This Contract, made and entered into this 15th day of March, A. D. 1915, by and between the CITY OF RICHMOND, a municipal corporation, body corporate and politic, in the County of Contra Costa, State of California, acting in its representative capacity by and through the Council of the City of Richmond, who are duly authorized, the party of the first part, hereinafter designated as the "City," and NORTH AMERICAN DREDGING CO., a corporation, the party of the second part, hereinafter designated as the "Contractor."

The word "Engineer" to mean H. D. Chapman, the Engineer employed by the City of Richmond to plan, supervise and have charge of the work herein specified, or his duly authorized representative or any deputy or assistant who shall be appointed by and under the authority of the said Engineer with the approval of the party of the first part.

The word "Contract" to mean and include this Contract and the Bond, Specifications and Plans herein contained, annexed or referred to herein. Said Plans being entitled "Plan for the Improvement of South Channel of San Pablo Canal," dated February 8, 1915, and said Specifications being entitled "Specifications for the Dredging of the South Channel of the San Pablo Canal, from the Property

of the Standard Oil Company to the San Pablo [28] Canal, in the City of Richmond, County of Contra Costa, State of California," dated February 8, 1915.

WHEREAS, said H. D. Chapman, in accordance with an order of said Council of the City of Richmond, has heretofore prepared and filed Plans and Specifications, Maps and Drawings, for the work hereinafter specified; and

WHEREAS, said City Council of said City of Richmond by order duly passed and adopted and entered on the minutes of said Council has heretofore regularly and duly approved and accepted the said plans and specifications hereinbefore referred to, and said City Council has ordered and directed that the said work herein provided for be done and the material and labor and things necessary therefor be furnished, happened and done, all in accordance with the plans, specifications and contract, and that bids be advertised for in accordance with law for the performance of the work and the furnishing of the labor and materials specified; and

WHEREAS, bids for the doing of said work and the furnishing of the necessary materials and labor therefor in accordance with said plans and specifications, have been regularly advertised; and

WHEREAS, the party of the second part has presented a bid and proposal for furnishing all of the material and labor and for the doing of said work, and said Council being duly advised in the premises, did, by resolution and order duly and regularly made and entered in its minutes, accept said bid and proposal of said party of the second part, herein termed

the Contractor, and did award to said Contractor the contract for furnishing said labor and material and the doing of said work, and did provide for the execution and delivery of this contract; and

WHEREAS, the plans and specifications for the doing of said work and the furnishing of the necessary material and labor therefor are herein incorporated, attached and annexed hereto [29] and are expressly referred to and made a part of this contract;

NOW, THEREFORE, in consideration of the premises herein and for the further consideration of the sum hereinafter mentioned, to be paid by the party of the first part to the party of the second part, herein termed the Contractor, as hereinafter expressed and provided for, the Contractor for himself, his successors and his assigns, does hereby promise, covenant and agree with the City that he will honestly and faithfully do and perform all of the work heretofore referred to and will furnish all material and labor necessary therefor, and will do and furnish all acts and things necessary to be furnished, happened and done, in strict accordance with the terms of the notice to bidders, contract, specifications, plans and contractor's proposal and bonds therefor, hereinbefore referred to and annexed hereto, and in strict accordance with all of the terms hereof, within the time hereinafter expressed; and upon the completion of said work as provided for by the terms of this contract, the Contractor will deliver said work herein provided for to the City or its authorized agents.



In consideration of the premises, covenants and agreements on the part of the Contractor herein contained, and for and in consideration of the performance of the work herein provided for, and for the furnishing of all material and labor necessary therefor, and of the acts and things necessary to be furnished, happened and done by the Contractor, the City hereby promises, covenants and agrees to pay, and cause to be paid, to the Contractor at the times and in the manner hereinafter specified, the sum of \$.1074 per cubic yard of material actually excavated, measured in place, and deposited through a pipe-line at such places as may be directed by the City Engineer, within a distance of 4000 feet from the point of dredging; and it is understood and agreed that the City of Richmond shall furnish or obtain a right [30] of way for conducting said pipe-line from the channel of said canal to the place of deposit and provide all rights necessary for depositing the material at places where directed by said City Engineer and assume all liability as may arise, if any, on account of so depositing the material at points and places as directed.

The price to be paid to the Contractor hereunder is in no case to exceed the sum of Ten thousand two hundred and no/100 dollars (\$10,200.00), for the doing and performing of said work, for the furnishing of material and labor necessary therefor, and for all acts, and things necessary to be furnished, happened and done. The payments to be made under this contract by the City are to be as hereinafter set forth.

It is understood that the Contractor is skilled in the trade or calling necessary to perform the work herein agreed to be done under this contract, and that the City not being skilled in such matters, relies upon the skill of the Contractor to do and perform all the work and labor necessary, and all the acts and things necessary to be furnished, happened and done, in the most skilled and durable manner, and the Contractor guarantees the workmanship and character of materials to be the best of their kind, and the acceptance of any part of the work, or the whole of the work, does not operate as a release to the Contractor or his bondsmen from said guarantee.

The Contractor agrees that if the work to be done under this contract shall be abandoned by him, or if this contract shall be assigned by him without the written consent of the City, or if at any time the said Engineer shall be of the opinion, and shall so certify in writing to the City, that the work, or any part thereof, is unnecessarily or unreasonably delayed by said Contractor, or that the Contractor is willfully violating any of the conditions or covenants of this contract and specifications, of the plans, or of any other papers to this contract, or is executing [31] the work under this contract in bad faith, the City shall have the power to notify said Contractor to discontinue the work, or any part thereof, under this contract; and thereupon the Contractor shall cease to continue such work or such part thereof as the City may designate.

And the said City shall thereupon have the power

to place such or so many persons and to hire such implements, machinery, equipment, tools, materials or material and labor as the Engineer may deem necessary to work at and to be used to complete the work herein described, or such part thereof as the Engineer may deem necessary; and to use such material as may be found upon the line of said work and to procure other material for the completion of the same and to charge the expense of such labor, material, implements, equipment, tools, etc., to the Contractor, and the expense so charged shall be deducted and paid by the City out of such money as may be due, or may at any time thereafter become due to the Contractor under and by virtue of this contract, or any portion thereof.

In case such expense is less than the sum which would have been payable under this contract if the same had been completed by the Contractor, then the Contractor shall be entitled to receive the difference, but in case such expense shall exceed the last said amount, then the Contractor or his bondsmen shall pay the amount of such excess to the City on notice by the City of the amount of excess so due.

Eight hours' labor shall constitute a day's work for any one calendar day for all work and labor to be performed under and in accordance with the terms and conditions of this contract, and two dollars and fifty cents (\$2.50) shall be the minimum compensation to be paid for labor upon all of said work.

Any laborer, workman, or mechanic employed at any time by the Contractor, or by any sub-contractor under him upon the work, [32] or any part there-

of, shall not be required or permitted, to work thereupon more than eight hours in any one calendar day, except in cases of extreme emergency by fire, flood, or danger to life or property, and the Contractor hereby agrees to forfeit as a penalty to the City under the terms of this contract, the sum of Ten Dollars for each laborer, workman, or mechanic, employed in the execution of said contract by the Contractor, for each and every calendar day during which said mechanic, workman or laborer is required or permitted to labor more than eight hours in violation of the terms of said stipulation, and the City is hereby authorized and directed through its proper representatives to withhold and retain from the Contractor, or from the said sub-contractor under him, all sums and amounts which shall have been forfeited pursuant to said stipulation, as the property of the City, as provided for by an act of the Legislature of the State of California, entitled "An Act Limiting the Hours of Service of Laborers, Workmen or Mechanics Employed Upon Public Works, of, or Work Done for the State of California, or on or for any Political Subdivision Thereof; Imposing Penalties for the Violation of the Provisions of said Act, and Providing for the Enforcement Thereof," etc., Approved March tenth, nineteen hundred three, and all acts amendatory thereto.

It is hereby further agreed that the Contractor shall and will, well and sufficiently, furnish a hydraulic dredge, the hull being 80 feet in length and 34 feet in width, and being fitted with a suction pump

of 15 feet in diameter, with all its appurtenances, supplies, superintendent and crew, together with her tackle, pipes, etc., for the purpose of performing the herein specified dredging work, and pay for all labor, fuel, oil and supplies incident to said dredge work, and keep said dredge and all its appurtenances in repair during the progress of the work. And the Contractor shall, under the direction and to the satisfaction [33] of the engineers do all of the dredge work included in and necessary for the dredging of the herein specified channels, subject to the provisions contained in this contract, and in the plans and specifications hereto attached, and all in accordance with the agreements contained in the permission for dredging work to be done under this contract and specifications given to the city of Richmond by the United States Government, a copy of which is hereto attached and made a part thereof, and the Contractor shall be and he is hereby held to all the provisions, regulations or permissions therein contained.

And it is further agreed that the Contractor shall not remove said suction dredge from the work without the written consent of the city of Richmond, unless said Contractor is delayed from proceeding with the work hereunder for a period of 15 days by some act of God, or by war, revolution, invasion, riots, strikes, injunction, order or direction of any Court or any unforeseen acts not the fault of the Contractor. If said dredge is so removed and within 10 days after such removal said City or Contractor may proceed with the work hereunder, then said Con-



tractor shall proceed with the work hereunder within thirty (30) days after receipt of written notice from the City Engineer pursuant to authorization of the City Council of the city of Richmond.

It is hereby mutually understood and agreed, between the parties hereto, that the Contractor shall begin the herein specified work on or before ninety (90) days after the execution of this agreement, or within ten (10) days after receipt of notice from the City Engineer pursuant to authorization from the City Council of said city, and that work shall be diligently prosecuted to completion within specified time. The Contractor shall maintain an average monthly output such that he will finish within the herein specified time limit, unless prevented by stormy or inclement weather or other act of God, or by war, revolution, invasion, [34] riots, strikes, injunctions, orders or direction of any Court, or any unforeseen acts not the fault of the Contractor.

The loss or destruction of the said dredge or its injury by fire or otherwise, to such an extent that more than thirty (30) days shall be required for its repair shall not terminate this employment, if the Contractor shall, within ten (10) days after such loss, destruction or injury notify the city of Richmond that the work herein mentioned will be continued by such Contractor with another dredge of similar size and capacity, or with another dredge provided that the Engineer shall approve in writing of the substitution of any other dredge of less size and capacity.

In the event that the Contractor shall fail to give



such notice or having given such notice shall fail to provide the substitute dredge or dredges hereinbefore mentioned within twenty (20) days after such loss, destruction or injury upon the site of the work, then this contract shall terminate, and such termination shall not be a breach of this agreement by the Contractor. If said dredge shall be so injured so that it can be repaired and placed in operation on the said work in thirty (30) days or less, the Contractor shall proceed with reasonable diligence to make such repairs and resume work and the consequent cessation from work shall be added to the time limit for the work hereunder and shall not be a breach of this agreement by the Contractor.

The Contractor shall make no claim that he has been delayed in the beginning, prosecution and completion of the said work or any of its branches, unless the cause for such delay shall be distinctly set forth in writing to said Engineer within twenty-four (24) hours of the time such delay is said to have occurred. In the event said work is commenced and the completion thereof is permanently stopped by injunction or other legal process or order, the city of Richmond shall not be liable to the Contractor in any amount in excess of the yardage of material already removed at the time of [35] such suspension or stopping of said work, at the unit price herein set forth, by reason of not being prevented from completing the work.

In the event that the Contractor is prevented from commencing said work by reason of any injunction or legal process or order, the City of Richmond shall not

be liable to the Contractor for any damage he may sustain by reason of his being prevented from commencing or completing the work provided to be done hereunder.

The City will pay, and the Contractor shall receive, in full, compensation for furnishing all necessary materials and labor, and for performing and completing all work which is necessary and proper to be furnished or performed in order to complete the herein specified work, the following prices, to wit: The sum of \$.1074 per cubic yard of material measured in place, payable in gold coin of the United States as follows:

On or before the tenth (10th) day of each calendar month the Engineer shall render or deliver to the Contractor a certificate stating the approximate amount of work performed under this contract during the previous calendar month by said Contractor, and the value of the same. Payments are to be made on the 10th day of each month at the rate of seventy-five (75) per cent of such amount. Final payment of the remaining twenty-five (25) per cent of said price shall be made thirty-five days after this contract is completely finished and accepted by the City of Richmond.

To prevent disputes and litigation, the Engineer shall in all cases determine the amount, quality and acceptability or fitness of the work and materials which are to be paid for under these specifications, and said Engineer shall determine and interpret all plans drawn from time to time for the detailing of the work.

The Engineer shall render a final certificate of quantities and acceptance of work whenever in his judgment such work shall [36] be completed.

Time of completion of said work under this contract shall be within a period of ninety (90) days from and after the commencement of work hereunder and such extensions as are herein provided for and such extensions as may be granted by the City Council of the City of Richmond. The time during which the Contractor is delayed in said work by any act of the Engineer, the City, its agents or employees, by the Acts of God, war, invasion, revolution, riots, injunctions or other prevention, order or direction of any Court, strikes, or by any condition or thing which the Contractor could not reasonably have foreseen and provided for, or by stormy or inclement weather, which delays the work in the judgment of the Engineer, shall be added to the aforesaid time of completion, and said time of completion shall be lengthened to that extent.

The City reserves the right to temporarily suspend the completion of the whole or any part of the work herein contracted to be done if such suspension shall be deemed necessary for the best interests of the City. And if the City Engineer of said city should pursuant to authorization of the City Council, notify said Contractor to temporarily suspend the completion of said work, said Contractor shall thereupon cease work under said contract until notified by said City Engineer to proceed, with said work and if said Contractor should be thus hindered or delayed in the performance of the work hereunder, said City of Richmond

shall pay to said Contractor for each and every day said Contractor is so delayed, at a rate equal to the average earning power of said dredge so delayed, as computed upon the actual performance of said dredge, so delayed under this Contract, and such delays shall not be charged against the Contractor's time limit hereunder.

The acceptance by the Contractor of the last payment for the work, if accepted without previous notice to said City of its claims against said City, shall be and shall operate as a release [37] to the City from all claim and liability to the Contractor for anything done or furnished for or relating to the work, or for any act of neglect of the City or its agents in any way affecting the work, excepting the claim against the City for the remainder kept or retained after the completion of the Contract as provided for in this Contract.

Upon written notice by the Contractor to the Engineer of the completion of said work hereunder provided for, the Engineer shall proceed without delay to examine the same and if found to be in accordance with the Contract, shall accept said work and shall notify the Contractor, or his agent, of such acceptance or nonacceptance, and if the latter, of his reason for such nonacceptance.

If there be any injunction, strike or interference of authorities which shall or will, in the opinion of the Engineer, delay the work, the Contractor shall give the City notice of such injunction or other cause of delay, together with all details, papers, copies or injunc-

tions or other things appertaining to such injunction or other cause of delay.

The City shall have the right to intervene or become a party to any suit or proceeding in which any injunction shall be obtained or prayed for, and to move to dissolve the same or otherwise as the City may deem proper.

The City shall have the right to have its own Counsel appear in any injunction suit or other suits which in the opinion of the City may delay the work and agrees to defend the City, its officials and the Contractor in any and all actions or proceedings in any Court, arising out of the execution of this contract or the performance of the work hereunder in accordance with the terms hereof.

If the contractor shall at any time claim compensation for any damage sustained by reason of the acts of the City, its agents, or in any manner arising out of or in connection with this contract [38] or the work thereunder, he shall, within ten days after the sustaining of such damage, make a written statement to the Engineer of the nature of the damage sustained or claimed, together with an itemized statement of the details, the amount of the damage, the Contractor's reason for claiming compensation therefor from the City, and such other explanations or details as may be required by the Engineer, and unless such statement be as thus required no claim for compensation shall lie against the City nor shall be heard or considered by the City.

On all work, until the termination of this contract,



the Contractor is to assume all liabilities of any kind or nature arising from said work, either from accident or negligence of said Contractor or its agents, or servants, excepting earthquakes, and tidal waves.

Should the Contractor sublet, relet, or assign any portion or all of the contract hereunder provided for, said Contractor and his bondsmen shall be held responsible, accountable, and answerable for all things, acts, conditions, work to be performed, materials to be furnished and all other things provided for in the contract, done, performed or happened by said subcontractor.

The Contractor shall punctually pay his employees, who shall be engaged upon the work covered by this contract, and shall pay such employees in cash, currency, or negotiable bank checks on a solvent bank, and he shall not pay such employees in store money orders, nor shall *be* carry on or conduct a company store.

All persons employed on said work shall be paid not less frequently than the 1st and 15th days of each and every month during the term of such employment.

The contractor shall not be interested either directly or indirectly in any employment agency or employment bureau, nor shall the Contractor receive or retain in whole or in part any fee or [39] charge made by any employment agent, employment agency or employment bureau for securing employment for any person on said work, nor shall the Contractor collect or retain out of the wages of any person employed on said work any fee charged by any employment agent, employment agency or employment bureau to



any person securing employment upon said work.

The Contractor will not collect or charge or retain out of the wages of any person employed on said work any hospital or medical charge or fee; nor shall the Contractor require any person employed upon said work to pay any medical, surgical or hospital fee or charge except where medical, surgical or hospital services have been actually supplied to such person.

Any violation of the above conditions of said Contract shall render the Contractor liable to a penalty of \$10.00 for each and every violation of any of the above conditions; such penalty to be deducted from the amount to be paid to the Contractor hereunder.

Time is the essence of this Contract.

IN WITNESS WHEREOF, the said party of the first part, the City, acting in its representative capacity by and through its City Council, has caused these presents to be duly subscribed and signed, and its corporate name and seal to be affixed hereto, and the Mayor of the City of Richmond who is duly authorized thereto, sets his hand and the Clerk of said City Council of the City of Richmond affixed the seal of said City as and for the good of the said party of the first part, and affixes his signature thereto, and the said party of the second part, the Contractor, has caused these presents to be subscribed and its corpo-

rate name and seal to be affixed by its Secretary thereunto duly authorized.

CITY OF RICHMOND.

By E. J. GARRARD,

As Mayor of the City of Richmond [40] and Presiding Officer of the City Council of the City of Richmond, Contra Costa County, State of California.

NORTH AMERICAN DREDGING CO. OF  
NEVADA.

Contractor.

By W. L. PAULSON,

Secretary.

Attest: A. C. FARRIS,

City Clerk and Clerk of the Council of the City of Richmond.

State of California,  
County of Contra Costa,  
City of Richmond,—ss.

On this 16th day of March, 1915, before me, W. Lindsey, a notary public in and for the County of Contra Costa, State of California, personally appeared E. J. Garrard and A. C. Farris, known to me to be the Mayor of the City of Richmond and the Clerk of the City of Richmond, respectively, and known to me to be the persons whose names are subscribed to the annexed instrument as such Mayor and Clerk, respectively, and they each acknowledged to me that they executed the within instrument as such Mayor and Clerk, respectively.

IN WITNESS WHEREOF, I have hereunto set

my hand and official seal, the day and year in this certificate first above written.

[Seal]                      WILLIAM LINDSEY,  
Notary Public in and for the County of Contra Costa,  
State of California.    [41]

### SPECIFICATIONS

FOR THE DREDGING OF THE SOUTH CHANNEL OF THE SAN PABLO CANAL, FROM THE PROPERTY OF THE STANDARD OIL COMPANY TO THE SAN PABLO CANAL, IN THE CITY OF RICHMOND, COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA.

### LOCATION.

The proposed channel extends northerly from the northerly line of the property of the Standard Oil Company in Lot Seventeen (17), Section 10 T 1 N. R. 5 W., M. D. B. & M., an approximate distance of 4000 feet, and connects with the San Pablo Canal in Lot Thirty-one (31), Section 3, T 1 N. R. 5 W., M. D. B. & M., as shown on Plan entitled "Plan for Improvement of South Channel of San Pablo Canal" dated February 8, 1915.

### GENERAL.

The work to be done under these Specifications is the dredging of a channel eighty (80) feet wide on the bottom, having side slopes of one (1) foot horizontally to one (1) foot vertically, the bottom of said channel to be eight (8) feet below low water, or an elevation of -8.0 feet below the base of the City of Richmond, as established by Ordinance No. 42. The de-

positing of the material dredged at such places as may be directed by the Engineer in charge, within a distance of 4000 feet from the point of dredging.

#### TIME.

The Contractor shall begin work within thirty (30) days after the signing of the contract for the work herein specified, and shall complete the work within a period of ninety (90) days from the date thereof.

#### SUPERVISION.

All equipment, workmanship, and construction shall be of the best of their several kinds, and fully up to the standard of the best modern construction work, and shall be under the supervision [42] and to the satisfaction of the City Engineer, and hereinafter mentioned as "Engineer." The right is reserved by the City of Richmond, its engineer or agents, to enter upon any part of the work, or any dredges or equipment used thereon, at any time for the purpose of inspection or necessary investigation.

#### DREDGE.

The Contractor shall and will furnish a hydraulic or suction dredge with all its appurtenances, supplies, superintendent and crew, together with her tackle, apparel, pontoons, pipe, etc., for the purpose of performing the said dredging work and to pay for all labor, fuel, oil and supplies incident to said dredging work, and shall keep said dredge and all of its appurtenances in repair during the progress of the work. The Contractor shall under the direction and to the satisfaction of the City of Richmond, or its agents and engineer, do all of the dredging work in-

cluded in and necessary for the dredging of the certain channel as shown on the accompanying map, and as set forth in these Specifications, subject to the provisions herein contained. All of the work shall be done in strict accordance with these Specifications.

Before the beginning of the work, and during its progress, the engineer shall set stakes 400 feet apart or at sufficient intervals to indicate the line of the channel, and the Contractor shall be required to dredge the material from such points as staked.

Should it appear that the work hereby intended to be done or any of the matters relative thereto are not sufficiently detailed or explained in the said Specifications, the Contractor shall apply to the Engineer for such further drawings or plans or specifications as may be necessary, and shall conform to the same as part of this contract.

During the progress of the above work the direction of the same and the interpretation of the Specifications shall be given only by the Engineer, and followed by the Contractors. [43]

Should any dispute arise, the decision of the Engineer shall be accepted as final by the Contractor.

The Contractor shall and will perform the said work and every part and detail thereof in a prompt and diligent manner, and shall operate the dredge or dredges which are engaged in the work of constructing said channel in the manner herein provided. The Contractor shall make no claim that he has been delayed in the beginning, prosecution or completion of the said work, or any of its branches.

The Contractor shall complete the work as herein specified, and as it would be difficult to ascertain the amount of damage the City of Richmond would sustain by reason of the failure of the Contractor to complete said work within the period herein specified; it is hereby agreed and in the event that the Contractor shall fail to complete said work at the time herein specified, the Contractor shall upon demand pay to the City of Richmond the sum of \$100.00 per day for each day consumed by said Contractor in excess of the period herein provided, said sum to be paid to and retained by the City of Richmond as liquidated damages.

The Contractor shall not let, under-let, assign, or transfer this contract, or any interest therein, without the written consent of the City Council of the City of Richmond.

The Engineer's estimate on the job is 69224 cubic yards of excavation, and the Contractor shall bid a unit price per cubic yard. No allowance on final estimates will be made for depths below an elevation of -9.0 feet, and in no case shall the amount to be paid for this work fully completed, exceed \$10200.00.

#### PAYMENTS.

Payments for work performed under these Specifications shall be made by the City of Richmond, on or about the 10th day of each month until the entire completion and acceptance of the said work, as follows: On or before the tenth (10th) day of each calendar month the Engineer shall render or deliver to the [44] Contractor a certificate stating the approximate amount of work performed under this Contract



during the previous calendar month by said Contractor, and the value of the same. Payments are to be made on the tenth (10th) day of each month at the rate of seventy-five per cent (75%) of such amount. Final payment of the remaining twenty-five per cent (25%) of said price shall be made thirty-five (35) days after this Contract is completely finished and accepted by the City of Richmond.

The City of Richmond shall not be liable or responsible for any accident, loss or damage happening or accruing to any person or to any property during the time of the performance of the work herein referred to, or in connection therewith by performance under these Specifications or the Contract, and the Contractor agrees to and does hereby, hold the City of Richmond harmless therefrom, and further agrees to reimburse the City of Richmond for any or all loss or damage in any way resulting from any cause whatsoever in connection with the performance of the work provided herein, or any acts of the Contractor, his agents or servants.

The Contractor shall in all instances provide for the use of any or all channels that are now open to navigation, and shall interrupt the same as little as possible, and shall maintain the necessary lights that must be displayed during the progress of the work, and the same shall be maintained in accordance with the rules and regulations established by the Secretary of Commerce, and the Contractor shall first obtain the permission of the Commissioner of Light Houses.

The Contractor shall submit to the City Council of the City of Richmond, the name of the Insurance

Company in which he intends to insure the workmen on the herein specified work, and shall further give sufficient information that the proper insurance has been taken out to cover the work herein contemplated in order to comply with the provisions of the State "Workmen's [45] Compensation Insurance and Safety Act" approved May 26, 1913, so as to secure the City of Richmond from any damage arising under the provisions of the State Law.

The Contractor's bid shall be based on his own knowledge of the ground derived from his own examination of the site of the work and its surroundings and conditions. No allowance will be made for any difficulties which the Contractor may encounter, he having bid with knowledge of all conditions as aforesaid.

The Contractor shall be constantly on the work during its progress or shall be represented by a foreman who is competent to receive and carry out any instructions which may be given him by the proper authorities, and the Contractor shall be held liable for the observance of any instructions of the Engineer which may be delivered to him or his representatives on the work.

#### PERMISSION FOR DREDGING.

Permission for the above work has been obtained from the War Department of the United States Government, but all of the work herein specified shall be subject to the supervision and approval of the local District Engineer Officer, U. S. Army, whose office is at 401 Custom House, San Francisco, California, and who may temporarily suspend the work at any

time if in his judgment the interests of navigation so require, or for any other reason, and the Contractor shall have no claim for damage against the City of Richmond for any such delay.

The Contractor will keep the City of Richmond free and harmless of any damage resulting from any injury done or performed by the Contractor to private property or the invasion of private rights, or any infringement of any laws or regulations, and these Specifications do hereby provide that the Contractor shall fulfill all such laws and regulations, ordinances, etc., either municipal, state or national, that may apply to the work herein specified.

In the event that said work is temporarily suspended or permanently stopped by injunction or other legal process or order, [46] the City of Richmond shall not be liable to the Contractor in any amount in excess of the yardage of material already removed at the time of such suspension or stopping of said work.

In the event that the Contractor is prevented from commencing said work by reason of any injunction or other legal process or order, the City of Richmond shall not be liable to the Contractor for any damage he may sustain by reason of being prevented from commencing or completing the work provided for herein.

### BONDS.

The Contractor or Contractors to whom the contract shall be awarded shall give a bond for the faithful performance of the contract, to be delivered upon the execution of the contract and to be for a sum not

less than one-fourth ( $\frac{1}{4}$ ) of the total estimated amount of the contract as determined from the Contractor's bid.

Said Contractor or Contractors to whom the contract is awarded shall also furnish a good and sufficient bond to secure the payment of claims or materialmen, mechanics or laborers as required by the law of the State of California, in a sum not less than one-half ( $\frac{1}{2}$ ) of the total estimated amount of the contract as determined from the Contractor's bid.

### CONTRACT.

Said Contract shall provide that any violation of the above conditions of said contract shall render the Contractor liable and subject to the penalties and conditions as follows: The City shall have the power to notify said Contractor to discontinue the work, or any part thereof, under this contract; and thereupon the Contractor shall cease to continue such work or such part thereof as the City may designate.

And the said City shall thereupon have the power to place such or so many persons and to obtain by contract, purchase, or hire such implements, machinery, equipment, tools, materials, or [47] material and labor, as the Engineer may deem necessary, by contract, or otherwise, as said City may deem it advisable to work at and to be used to complete the work herein described, or such part thereof as the Engineer may deem necessary, and to use such material as may be found upon the line of said work and to procure other material for the completion of the same and to charge the expense of such labor, material, implements, equipment, tools, etc., to the

Contractor, and the expense so charged shall be deducted and paid by the City out of such money as may be due, or may at any time thereafter become due to the Contractor under and by virtue of this Contract, or any portion thereof.

The Contractor shall familiarize himself with Ordinance No. 325 of the City of Richmond, providing for a minimum wage of \$2.50 for an eight hour day.

Richmond, California, February 8, 1915.

H. D. CHAPMAN,  
City Engineer.

Received copy of within answer this 12th day of July, 1915.

J. K. JOHNSON,  
Solicitor for Plaintiffs.

[Endorsed]: Filed Jul. 12, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

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[Title of Court and Cause.]

**Opinion Directing Entry of Decree in Favor of Plaintiffs Enjoining Further Dredging and Awarding Damages.**

J. K. JOHNSON and W. P. JOHNSON, for  
Plaintiffs.

D. J. HALL, for Intervenor, City of Richmond.  
EARL D. WHITE, for Defendant.

VAN FLEET, District Judge:

This is a bill to enjoin the defendant from further proceeding to dredge out and deepen a certain water-



way or channel traversing lands alleged to belong to the plaintiffs' testator, and from carrying away the earth or soil therefrom, as constituting a wilfull and malicious trespass and waste, and to recover damages for the waste and injury already done.

The answer of the defendant denies any ownership or right of any kind in the plaintiffs in the land involved, and sets up that the channel in question is "known and designated as the South Channel of the San Pablo Canal, all within the city limits of the city of Richmond, county of Contra Costa, State of California, and that said channel is and has been for many years last past, a navigable waterway, with a public terminus, connecting the said city of Richmond with the San Pablo Bay and the bay of San Francisco"; and that "for many years last past vessels engaged in commerce have navigated and traversed said channel"; that all the acts done and committed by defendant of which complaint is made have been had and done under and in pursuance of a contract theretofore entered into between defendant and said city of Richmond whereby "defendant agreed to dredge a channel eighty (80) feet wide, in and through said south channel of said San Pablo [49] Canal, to a uniform depth of eight (8) feet below low tide," and that the work of dredging said channel was being done by defendant "for the purpose of improving said waterway in the interest of commerce and navigation," etc. It denies that plaintiffs have suffered any damage or that defendant "has committed any wilfull or malicious or any trespass upon any property of plaintiffs." It then alleges, as ground of affirmative relief, that after defendant had



removed approximately 22,000 cubic yards of material from said channel it was stopped by the injunction issued herein and has since discontinued work under said contract, and that by reason of such interruption and delay in its work defendant has suffered damages on its part for which it asks judgment against the plaintiffs.

The city of Richmond was permitted to file a bill of intervention in which it alleges that the channel in question is a natural arm of San Pablo Bay, which is a navigable body of water within the State; "that the depth of water in said channel varies with the rise and fall of the tide, and that at ordinary low tide said channel has a minimum depth of two (2) feet, and at ordinary high tide has a minimum depth of eight (8) feet"; and after alleging substantially in the terms set up in the answer the navigation of said channel during recent years between other points and the city of Richmond, it is alleged that in order to improve the navigability of the channel and render it more suitable for commerce "it became and is necessary to deepen said channel throughout its entire length and to a width of eighty (80) feet, to a depth of eight (8) feet at ordinary low tide." It is alleged "that the city of Richmond has a population of 20,000 or upwards, and contains within its limits a large number of extensive manufacturing plants and industries; that it is essential for the best interests of the city of Richmond, its inhabitants and the public generally, that the navigability [50] of said channel be improved and increased as aforesaid, thereby affording better trans-

portation facilities for the city of Richmond, its inhabitants and the public generally.” It admits the entering into the contract as set up by defendant for the deepening and widening of the channel, and alleges that it has procured for that purpose a permit from the War Department of the United States for such improvement. It denies any right or title in plaintiffs in or to the premises involved, or that any soil or other thing of value is being taken from plaintiffs’ property.

In response to the bill of intervention the plaintiffs filed an answer denying all its allegations as to the navigability or commercial value of said channel, and alleging that the intervenor and the Standard Oil Company of California have entered into a contract “whereby it was agreed that the city of Richmond should cause the dirt or soil dredged or taken from the property of plaintiffs to be deposited upon the property of the Standard Oil Company of California, and that it should pay to the city of Richmond ten and 74/100 cents per cubic yard therefor, that being the exact price that the city of Richmond agreed to pay the defendant herein, North American Dredging Company of Nevada for dredging said alleged channel as aforesaid, and that the aim and purpose of said agreement between the Standard Oil Company and the city of Richmond was that the Standard Oil Company should pay for said dredging, and thereby receive and obtain the property of plaintiffs without paying them therefor.” And it is alleged that if said channel is deepened in accordance with the contract between the intervenor and the defendant “it

will enable the Standard Oil Company of California to obtain a waterway to the San Pablo Bay over and across and upon the land and property of plaintiffs." There is a further allegation that the city contemplates using the dredged channel as [51] an open sewer; but no evidence was offered on the subject and it may be disregarded.

The evidence shows that the channel in question, which is about a mile in length, runs in its entire course through a tract of salt marsh or tide land comprising some 500 acres more or less, having its northerly boundary on San Pablo Bay, and extending southerly for a distance of a mile, more or less, between a natural waterway known as San Pablo Canal or Creek, which borders it on the east, and the potrero or highlands, constituting the San Pablo peninsula, on the west. This land was acquired by Dr. Tewksbury, the grandfather of the plaintiffs, in the early '70's by grant from those holding patents from the State under the State Tide Land Act, (Stats. 1867-8, p. 716; Stats. 1869-70, p. 541); and the title has been regularly transmitted to plaintiffs' testator, in whose estate it now rests. Like all lands of its character on the margins of the sea, its bays and inlets, it is subject to tidal action, being largely submerged at flood tide and mostly exposed at its lower stages. As disclosed on the map, and by a personal inspection made by the Court, it is intersected by many tidal sloughs or creeks, cut by the flux and recession of the waters of the bay in their diurnal flow, some of them of considerable magnitude and others dwindling to mere ditches or rivu-

lets. At the height of the tide many of these sloughs have a considerable depth of water, while at its lowest stages, in most of them, the mud bottom lies exposed, or practically so. The particular channel in controversy branches from San Pablo Canal or Creek, a stream of much greater magnitude, a short distance south from where the latter debouches from the marsh land into San Pablo Bay, and thence winds its way in a general southerly direction throughout the length of the tract of land above-described. It varies in width and depth, being in its [52] lower reaches as wide as 100 feet or over, and narrowing somewhat farther south; with a depth dependent upon the state of the tide of from two feet or less at low tide in its shallowest parts toward the south, to approximately seven or eight feet at its flood, and deepening somewhat as it flows to its mouth and enters the San Pablo Canal.

Neither the channel nor the land underlying it was excepted from the grant by the State to its patentees of the tide lands through which it runs, nor in the deeds from the latter conveying the title to plaintiffs' ancestor, nor is the channel in any way referred to or mentioned in said conveyances; nor, so far as appears, has it ever been meandered by the State or designated among the streams or waterways declared navigable in its statutes. While referred to in the answer as the "South Channel of San Pablo Canal," it bears no name or designation on the official map. At the time Dr. Tewksbury acquired these tide lands and for many years thereafter there was no settlement in the immediate

neighborhood, the contiguous highlands being devoted to farming and grazing, for which latter purpose the marsh lands were included so far as available. It was for this purpose, apparently, that Dr. Tewksbury acquired the marsh lands. He owned a large acreage in the adjacent highlands, and the evidence shows that shortly after the acquisition of the marsh lands he constructed a dyke across them near their northern boundary to keep out the tide and render the land more available for pasturage—much of the grasses growing thereon making good food when the waters were kept out. This dyke, but for a tide-gate therein, was built solidly across the channel in question, and the evidence tends to show that it was maintained for many years—as late as 1901—in a condition efficient to restrain the influx of the tide and render the lands more available for pasturage of cattle. [53] Since then the dyke has largely disappeared and no longer obstructs the channel, although evidence of its existence remains. During all these years, while San Pablo Canal was navigated to some extent, the channels and sloughs intersecting these lands, including the one in controversy, were never used or regarded as available for any species of navigation other than for duck boats or punts for hunting and fishing; no larger craft ever attempting to traverse them. This condition continued down to about the year 1900 or a little later. About that time the Santa Fe Railroad determined on Point Richmond as a terminus on San Francisco Bay, and immediately thereafter the town or city of Richmond sprang up. The latter is built



upon the highlands to the south and west of the marsh lands in question, and these highlands extending northerly in a peninsula terminating in San Pablo Point partially divide the waters of San Pablo Bay from the bay of San Francisco, of which it constitutes an arm. When incorporated some years since the corporate limits of the town were made to include this body of tide lands, but the latter remains unreclaimed and unimproved except by the Standard Oil Company as hereinafter stated. The town has now grown to a place of considerable population and commercial importance, with a deep water harbor on the eastern shore of the bay of San Francisco.

Some years since the Standard Oil Company of California established a refining plant at Richmond, its site covering a considerable acreage of highland and including a portion of tide or marsh land purchased by it from plaintiffs' testator off the southerly end of the tract above-described. At that time the slough or channel in question continued into or through the portion of the marsh land acquired by the Oil Company, but the latter has since built a levee or bulkhead across the channel and along the northern boundary of its marsh lands, and has either wholly or partially filled in the channel where it crosses its land. [54] Immediately north of the marsh land sold to the Oil Company is an unimproved strip of land about 200 feet wide, sold by the plaintiffs' predecessors to the Belt Line Railroad, which narrow strip runs across the marsh between the lands of the Oil Company and the present hold-



ings of the plaintiffs, forming the southerly boundary of the latter and the northerly boundary of the former.

It is only since the establishment of the Oil Company's Works that any effort has been made to navigate the channel by craft of burden, and the evidence shows in that regard that upon some few occasions power boats and scows of light draft have been taken up through San Pablo Creek or Canal and into this channel on the flood tide, carrying some small amount of material for the use of the Oil Company; but it was found that excepting at such periods of high tide, it was impracticable to put the channel to such use without deepening it for the purpose. Accordingly the dredging work which the bill seeks to stop was commenced in 1915 as the result of an arrangement between the Oil Company and the city, whereby the latter contracted with the defendant to do the work of dredging the channel as set forth in the pleadings, and the Oil Company, in consideration of the removed soil being deposited on its land within its levee or bulkhead, contracted with the city to pay it the same price per yard for the material which the city was to pay the defendant for its removal. Upon the theory that the channel constituted a public navigable waterway, and its improvement a benefit to navigation, a permit from the officers of the War Department for the prosecution of the work was procured. The dredging operations were commenced at the levee or bulkhead of the Oil Company working northerly, and some 900 feet or over of the channel at the south end had been

dredged and about 22,000 cubic yards of material removed when stopped by the preliminary injunction procured by the plaintiff.

1. The presentation of the case by the defendant and the [55] intervenor proceeds largely, if not entirely, upon the theory that its determination turns solely upon the question whether the channel involved is a navigable waterway, which they affirm it to be, and as such subject to improvement by the authorities for the benefit of commerce and navigation. Of course if it is a navigable stream there can be no question that, whatever may be the rights of the plaintiffs as riparian proprietors in the land underlying the stream below mean high water line, they are held in subordination to the public right of navigation, and the coincident right to employ all appropriate means to improve the channel for such purpose. *Willink vs. United States*, 240 U. S. 572; *Greenleaf Johnson Lumber Co. vs. Garrison*, 237 U. S. 251. But under the circumstances disclosed here as to the arrangement under which the work sought to be enjoined is being done and the dredged material disposed of, a question arises whether the rights of the plaintiffs are not being unlawfully invaded independently of the consideration whether the channel in question is or is not navigable. That the evidence is sufficient to show a valid legal title in the plaintiffs to the land through which it runs, including the soil underlying the channel itself, is not challenged in the argument, nor is the proposition open to dispute. (*Knudson vs. Kearney*, 171 Cal. 250, and cases there cited.) Nor is there any ques-

tion that it is for the State to determine whether she will part with the title to the lands underlying her waters, navigable or otherwise, and vest it in private ownership. *Donnelly vs. United States*, 228 U. S. 243. In that case it is said (p. 261): "In *Barney v. Keokuk*, 94 U. S. 224, 388, it was held that it is for the States to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto.

. . . If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." And it is further [56] said (page 262): "But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States. Thus the State of California, if she sees fit may confer upon the riparian owners the title to the bed of any navigable stream within her borders."

Such being the law, we may assume for present purposes that this is a navigable waterway, for it nevertheless appears that the plaintiffs own the soil underlying it to the same extent and by precisely the same title as they hold the riparian lands upon its banks, subject only as to the submerged soil that their right is subordinate to the right of navigation, which may require its removal for the improvement of the stream. But none of the cases hold, and it is not the law, that for such purpose more than another the soil of the riparian proprietor may be

taken and carried away without his consent and without compensation and transferred to another in private ownership. And yet that is what is being done under the arrangement by which the work in this instance is being carried out—the soil of plaintiffs being taken and deposited on the land of the Standard Oil Company for the betterment of the latter. It is not a question of the value of the thing taken, but one of ownership—of property rights. Whatever the value may be, property cannot be thus taken without compensation.

It would seem, therefore, that the plaintiffs are entitled to have the removal and appropriation of their soil, as disclosed in the evidence, stopped, independently of the question of the navigability of the stream.

2. But do the facts show this channel to be a navigable waterway in the sense and for the purpose contended for? This is largely a question of fact to be determined from the character of the stream, its situation and availability as a highway of [57] commerce, and the other surrounding circumstances affecting the question. While courts take judicial cognizance of the navigable character of large and well-known bodies of water, like our Great Lakes, or of streams like the Mississippi or Ohio, as to those of a more insignificant character, the history and nature of which are less known, the fact of navigability must be established by evidence, and the burden of proof rests on the party asserting that character. *Harrison vs. Fite*, 148 Fed. 781. The mere depth of water will not place a stream in the cate-

gory of a navigable waterway, other essentials being absent; nor, on the other hand, will the want of depth or capacity in part of its course take a stream out of that category if the other characteristics are present. Nor does the mere fact that it is a stream in which the tide ebbs and flows necessarily tend to any extent to demonstrate its navigable character. As stated by Chief Justice Shaw in *Rowe vs. The Granite Bridge Company*, 21 Pick. 344:

“It is not every ditch in which the salt water ebbs and flows, through the extensive salt marshes along the *cost*, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture.”

The essentials of a navigable stream or waterway are thus stated by the Circuit Court of Appeals for the Eighth Circuit in *Harrison vs. Fite*, *supra*:

“To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the



transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious and [58] unprofitable, is not sufficient. . . . Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation."

In *People vs. Economy Light & Power Co.*, 89 N. E. 760, 768, it is said:

"To hold that the State can, by artificial means, make a stream navigable which in a state of nature is not navigable, and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to say that private property may be taken for public use without compensation."

See also *Chisolm vs. Caines*, 67 Fed. 285; *Loevy vs. United States*, 177 U. S. 621; *Wilson vs. Prickett*, 139 Pac. 754.

In his work on *Irrigation and Water Rights* Mr. Kinney, treating of navigable waters, states (Vol. 1, p. 570) the principle that, "A stream which can only be made navigable or floatable by artificial means is



not a public highway.” And at page 567 the author says: “In order to be a public body of water, it must be accessible to the public, and have a terminus by which the public can enter it and another from which they can leave it. Hence, creeks which open in navigable waters, but merely lead into private lands are not public navigable waters.”

When these principles are applied to the facts in this case it is quite apparent, I think, that the latter are lacking in several essentials required to constitute this slough a public navigable waterway. As we have seen, it has never been in fact navigated in any true sense, and has not been treated or considered, either by the public or by the State, as capable of navigation. While this lack of recognition by the State is not conclusive, it is nevertheless not without potency as a fact in its bearing on the question, since it is not to be lightly presumed that the State will part with its title to property of known or recognized value for public use. But, in the next place, the conceded necessity of the work sought to be prosecuted is a [59] recognition that the channel is not susceptible of being navigated in its present state without artificial aid. And the facts, I think, sufficiently demonstrate that this work, instead of being intended for the improvement of a navigable stream, is really intended to render navigable a stream not so in its natural state. Nor does the evidence show that the channel is or will be in any true sense useful to the public for the purpose of navigation. It is true it is now within the corporate limits of the City of Richmond, which in that sense may be said to con-

stitute a public terminus. But, as the evidence shows, it lies only at its "back door," so to speak, runs wholly through private property, and is so situated that its use is, and so far as appears can be, available only to the Oil Company, and the Belt Railroad, should the latter see fit to construct an approach. It is not accessible or available to the public nor to any other private industry, the evidence showing that the nearest established street of the town is at least a quarter of a mile from its southern terminus. Under the principles above stated, I am satisfied that the Court would not be justified upon the facts in holding this channel to be a navigable stream.

It results that a decree must go in favor of the plaintiffs enjoining the further prosecution of the work in question, and awarding them such damages as they may have suffered, with their costs. Should the amount of the damages not be agreed upon a reference may be had for its ascertainment.

[Endorsed]: Filed August 28, 1916, Walter B. Maling, Clerk. [60]

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[Title of Court and Cause.]

**Interlocutory Decree.**

This cause came on to be heard at this term and was argued by counsel; and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the defendant, North American Dredging Company of Nevada, a corporation, and the inter-

venor, City of Richmond, a municipal corporation, and their and each of their officers, agents, servants, employees and attorneys be, and they and each of them hereby are, and is, enjoined from, and they and each and everyone of them do desist and refrain from cutting, dredging or excavating any ditch or canal or carrying away the dirt or soil upon the property of the plaintiffs and described as all of that certain land and real property situated in the County of Contra Costa, State of California, and described as being a portion of Survey No. 190, Swamp and Overflowed Lands in S.  $\frac{1}{2}$  Sections 10 and 11, W.  $\frac{1}{2}$  Section 14, N.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$  Section 14 and E.  $\frac{1}{2}$  Section 15, all in Township 1 N., R. 5 W., Mount Diablo Base and Meridian, and containing 342.10 acres more or less.

Also all of the salt marsh and tide land which lies upon the westerly side of a certain slough or tide creek known as "Peter Davis Creek" situated in Contra Costa County and which is embraced in Survey No. 5 of Contra Costa County for State salt marsh and tide lands. Said lands being more particularly described as follows, to wit:

The fractional S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 2, and the West  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of Section Eleven (11) in Township 1 North, Range 5 West, Mount Diablo Meridian.

Also Surveys No. 6 and 7 State Tide Lands, Contra Costa County, Township No. 1 North, Range No. 5 West, Mount Diablo [61] Meridian; Section No. 3; and 10 Being the fractional S. E.  $\frac{1}{4}$ , fractional S. W.  $\frac{1}{4}$  of Section 3 and fractional N. E.  $\frac{1}{4}$  and

fractional N. W.  $\frac{1}{4}$  of Section 10, more particularly described in field-notes of said survey as follows: All the tide land lying between the U. S. meander-line and the shore of San Pablo Bay in the southwest quarter of Section Three and in the northwest quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing Thirty-eight  $\frac{2}{100}$  acres; and all the tide land lying between the U. S. meander-line and San Pablo Bay and Slough in the southeast quarter of Section Three, and in the northeast quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing one hundred and eighty-seven  $\frac{71}{100}$  acres, and containing in both surveys two hundred and twenty-five  $\frac{72}{100}$  acres, being more fully described in Tide Land Surveys No. 6 and 7 Contra Costa County.

And it is further ordered that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to Harry M. Wright, Esq., Master in Chancery, to hear testimony as to such loss and damage, and to take an accounting thereof, and report the same together with his findings thereon to the Court, and also that plaintiffs have and recover judgment for their costs in this behalf expended.

Dated September 1st, 1916.

WM. C. VAN FLEET,  
Judge of the District Court.

[Endorsed]: Filed and entered September 1, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [62]

[Title of Court and Cause.]

**Proceedings Had Before Honorable Wm. C. Van Fleet, Judge.**

Commencing on Friday, December 17th, 1915.

J. K. Johnson, appearing as solicitor for plaintiffs, and Earl D. White, appearing as solicitor for defendant and D. J. Hall, appearing as solicitor for intervenor.

Thereupon the following proceedings were had:

Plaintiffs offered and Court admitted evidence of plaintiffs' title to the land and property described in the amended bill of plaintiffs' on file herein and proved their title to the said land described in said amended bill of complaint as set forth in amended bill of complaint, with the exception of the strip of land about one hundred or two hundred feet wide owned by the Belt Railroad Company, running across the lands of plaintiffs and coming out near the point marked "No. 20" on a map admitted in evidence and marked "Plaintiffs' Exhibit 10."

**Testimony of Lucio M. Mintzer, for Plaintiffs.**

LUCIO M. MINTZER, being first duly sworn, as a witness on behalf of plaintiffs, testified as follows:

I am one of the plaintiffs in this case and reside in San Francisco. I know the situation of the land described in our amended bill, the description referred to in the evidence and deeds of conveyance just read in court. I recognize what the map now shown me refers to. The Standard Oil property is located down on this section here (indicated by the letter "A"). The location of the tract of land referred to



(Testimony of Lucio M. Mintzer.)

in our Amended Bills is west of this slough, which I marked "B." running up to the shore line bay. They include the shaded portion west of the slough which I have marked "B," and east of what is known as "Potrero" on this map. [63] The shaded portion is the property described in our Amended Bill. The slough which defendant has attempted to dredge is about half way between the slough marked "B" and the "Potrero. It is indicated on the map with the letter "C." Our holdings are all of this shaded line north of the Standard Oil holdings and west of the slough "B," east of the "Potrero," with the exception of the strip here which is owned by the Belt Railroad Company. I think this strip is 100 or 200 feet wide. It comes across about as far as this slough and then it comes up to the north and comes out at about that point there which I will mark on this embankment "No. 20." It is the Richmond Belt Line right of way, but there is nothing constructed on it. (Map is here offered in evidence and marked "Exhibit 10" for the purpose of illustration.) The character of the land which I have indicated to the Court and which is described in our Amended Bill is marsh land. I saw this property in the month of May, 1915. I saw the defendant's dredger on the land; I am not sure, it was in May or it was either in the latter part of April or May. I saw the dredger in the slough which runs through this land, the land in suit, I saw the dredger not at work, but I saw it there before we filed the suit. The dredger was standing on the bottom of the slough, on the mud you might say. It



(Testimony of Lucio M. Mintzer.)

was not working at the time I saw it. There was a pile of mud and apparently gravel or rock that appeared to have been taken out by this dredger and put on the ground of the Standard Oil Company.

Cross-examination.

The character of the land adjacent and on either side of the canal that empties into the channel, which I have marked "C," was mud. I don't know whether it was very deep mud, but there was mud there in which were growing tules and other kinds of marsh grass. The water-way "C" flows into what is known as San Pablo Creek, I think. San Pablo Creek flows into San Pablo Bay. [64]

The COURT.—The Court will take judicial cognizance of that, that is an arm of San Francisco Bay.

The tide does not ebb and flow over all of the land adjacent to the water-way, marked "C," except one time I saw a lot of land under water and that was after a very heavy rain in March 1913; at that time the whole marsh there was covered with water. The tide does not cover this marsh land daily at flood. It is above the ordinary flow of the tide. All of it with the exception of some of these sloughs around here which high tide does get into. I have never seen this land entirely submerged with water at ordinary high tide. I should say from what I have seen of it, and I have seen it at very high tide, that it is not. I would not say that the tide ebbs and flows over the entire length of the water-way up to the line of the Richmond Belt Railroad. I have never seen it that

(Testimony of Lucio M. Mintzer.)

way. When I saw the dredger in this slough I should say it was between two and three hundred feet of the land of the Standard Oil Company. I will indicate its position on the map and mark it "D." I think this was about April 1915, I was on this slough marked "C" possibly the first time in 1912 or 1913. I have not had much knowledge of it, I do not know its character as to navigability. I have never seen any vessels running up there before I saw this dredger in there. This canal which I have designated as "C" extends from San Pablo Creek through our land and on beyond the property of the Richmond Belt Line Railroad to the property of the Standard Oil Company, which I have designated here as "A."

**Testimony of John H. Nicholl, for Plaintiffs.**

JOHN H. NICHOLL being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I reside in Oakland; I was born in San Leandro, Cal. I have been acquainted with the locality now known as the city of Richmond and San Pablo basin, San Pablo Canal in Contra Costa [65] County, and with the property in that locality all my life. I recognize this map now shown me, marked "Sale Map 11" salt marsh and tide lands situated in the counties of Alameda and Contra Costa, State of California. This map is my property; it indicates the property near what is now the city of Richmond and is located in the city of Richmond in or about the San Pablo Canal. I know this property in controversy. I knew Dr. Tewksbury. I know the property that he

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(Testimony of John H. Nicholl.)

had in the Rancho de San Pablo and also the land in the marsh east of that and between the horns of the San Pablo Rancho. When I was a small boy I used to hunt on the marsh property. I was shooting out there in 1868. In the early 70's Dr. Tewksbury conceived the idea that he would reclaim this land so he started to put a levee across from here and part over there (indicating on map) The dike that I have pointed out here runs in the northern part of Section 10, just south of the line of Section 3. This map is one of the maps that was issued by the state during the time the salt marsh and tide lands were sold in 1871 under the Act providing for the sale of salt, marsh and tide lands. The dike referred to comes further over. It comes into Section 2. It comes over to here (indicating). It runs clear through to the high land. I saw some of the levee built. It was built by Dr. Tewksbury somewhere between 1868 and 71; I should judge about 1870. Here is where that started from (indicating). Here was where a Portuguese named Lucas was living. That was when I was a boy. It started right back of his place where I tied my horse, the men were working there, and I came across these sloughs and came to somewhere in here (indicating). It crossed the water-ways marked "C" and "B." There was piling in there. This levee was constructed of piling driven by wooden mallets across this water-way "B." This here marsh was peat, all full of roots and grass and one thing and another in there and Borbi built that up with big slats and made a levee 10 or [66]

(Testimony of John H. Nicholl.)

15 feet at a time. I was not acquainted with the water-way or slough marked "C," I did not pay much attention to that. This is the one we were afraid of (indicating). That was the big one. I was a boy shooting ducks at that time and I was interested in that. That was not completely shut off. There were great big timbers across there and I walked across the timbers, another boy and I. I am speaking of the big slough marked "B." This one "C" was shut off, because I walked across there. The dike as indicated on the map is the correct position, as I remember it, of that dike. There was another levee put down here at the extreme end of Potrero, the south end, (indicating). The levees were failures as far as the channel was concerned, so far as the big slough marked "B" was concerned. They could not restrain the water in channel "B." The water in "C" on this map was shut off completely because I remember that as being the slough. I got across the slough marked "C" upon the levee all one winter, then after it had gone, the tide had taken it out. The character of the land and the location of the slough, marked "C" upon the map, is salt marsh. There is salt grass, all kinds of salt grass, marsh too, in some places. In the early 70's I saw cattle turned in there grazing on the land. It was for no other purpose because they could not raise anything on it. There are factories there in the neighborhood of this slough "C" at this time, the Standard Oil. The Belt Line Railroad runs there—the Santa Fe Railroad is close by there, the shops. The slough runs

(Testimony of John H. Nicholl.)

down to near the Standard Oil Property. I guess the Standard Oil property is the only one. There was no such thing as navigating any ship on the water-way marked "C." All these hills, the "Potrero" and the "San Pablo" from the Standard Oil Company north, that never was plowed, in fact there was nothing there until the Standard Oil came, except a few ranch houses just for taking care of the cattle; there was never any need for any [67] commerce there. You could go on any of these sloughs at high tide with a scow-schooner. I never saw any boats on the slough marked "C."

Cross-examination.

In 1868 everything was improved around there except the marsh. This salt marsh is a separate piece of property. It was not a part of the San Pablo Rancho. The city of Richmond was incorporated in 1905. The land I have referred to is all within the corporate limits of the city of Richmond now. What I mean by a dike is some dirt thrown up, a rough sort of dike; but across the big slough there was piling driven with wooden mallets by Borbi. I walked across that for one winter and after that it was gone. The tide took it out. All of the water-ways there were washed out by reason of the tide action. The tide ebbs and flows in these channels. Nothing could be raised on this land. It was full of salt. The salt water was not shut out. There was some kind of grass growing that cattle lived on. The cattle were there one season and then they took them away. (Map introduced in evidence marked "Exhibit 11.")



**Testimony of Antone B. Borbi, for Plaintiffs.**

ANTONE B. BORBI, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I have lived in Richmond and vicinity about 35 years. I became acquainted with Dr. Tewksbury about 1873. I leased the Potrero and marsh lands from him. I lived over there on Dr. Tewksbury's lands. There used to be a house on there somewhere. I leased all of the marsh land and the upland from the Santa Fe down to the north. I lived there and rented that land from about 1873 to 1901; that is marsh land. I pastured cattle on it from 1873 to 1901, sometimes had 200 and sometimes 250 head of cattle running there. The levee starts near the small hill here (indicating); it runs through the place to the east crossing [68] across the big slough. It crosses all the sloughs. There are four sloughs. Dr. Tewksbury built the levee before I went there. The levee was still there when I went there. It was constructed across slough marked "C"; they brought some lumber and put dirt between. The tide did not wash it out. The water could not flood except when a big storm came. It would not wash out but the water would go over the levee. The levee was maintained just as long as I was there. In 1901 one little piece washed out here somewhere in there. During that time it never got washed out across the big slough. That levee was in existence from 1873 to 1901. I repaired these levees pretty nearly every year. I raised them up and made them a little wider. That levee shut off this slough "C" so that nothing



(Testimony of Antone B. Borbi.)

could go up, boats or anything. I have not seen it for a good many years now. I don't know about it.

Cross-examination.

I know all these lands because I built those banks there. There was a small slough there that gave way but the other was all in repair when I left. I had cattle in there from June until October. I didn't have cattle in there other months because it is wet. We had tide-gates in the levee to let the water out. There was salt grass growing on this land and clover in some places. In a big storm sometimes it washed over, but not with the tides. Inside the levee in the slough marked "C" the water was 3 or 4 feet deep when the tide was out. I never saw any ship or vessel in slough marked "C."

**Testimony of Benjamin Boorman, for Plaintiffs.**

BENJAMIN BOORMAN, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I have made my home at place now known as Richmond for 56 years. I know the premises referred to by the witnesses [69] in this case. I first knew this land in 1859. At first my home was within two miles of this land; it is now about 2½ miles. It is marsh land. The tide overflows it at times at high tide. I have seen it overflow—part of it, not the whole of it. The part I have seen overflowed is next to the levee and north of the levee. The levee stopped the tide from overflowing the land. The levee ran right across the sloughs and shut them off. I first

(Testimony of Benjamin Boorman.)

saw this levee about the first part of 1870. I saw it at different times right along, for 10 or 12 years. There was grass growing in places on this land. I saw cattle pastured on this land from about 1880 to 1890. The levee crossed the slough marked "C." The levee was constructed across the channel; it was timbers drove down and then filled in. They had flood-gates. The dike that crossed the slough marked "C" was constructed in a similar manner to the dike that crossed the channel "B."

Cross-examination.

It was 10 years ago, as I last remember, the levee crossed channel "C". It may have been more than 10 years ago. I could not give you the date. I have been up there within 10 years but I did not notice the levee. The land inside the levees was pastured. There was a fence there to keep them off in wet times. I never saw any stock there in winter. There was a fence running out here (indicating). I never saw cattle ranging in this portion of the land where the channel "C" is, but I saw them all through here (pointing to the property of the Standard Oil Company). I thing the cattle pastured down as far as the levee in some places, but some places they could not get in. I think there was a levee there that cut them off. The cattle could not pasture north of the levee that I saw in the early 70's. This land isn't submerged unless it is high tide. I don't think ordinary high tide covers it all. I should say this levee has not been maintained across channel "C" since about 1900. [70] I knew Mr. Borbi; he was a ten-

(Testimony of Benjamin Boorman.)

ant of Dr. Tewksbury and his wife, Emily S. Tewksbury after the Doctor's death. That was up to about 1901.

**Testimony of A. C. Faris, for Plaintiffs.**

A. C. FARIS, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I am city clerk of the city of Richmond. I have brought with me an agreement that the Standard Oil Company entered into by the city of Richmond and the Standard Oil Company sometime in April of last year, requiring the dumping of the dredgings of the south branch of the San Pablo levee or channel upon the land of the Standard Oil Company. That document is on record in the files of my office.

Mr. JOHNSON.—I now offer this agreement in evidence; it is dated the 30th of March 1915, between the Standard Oil Company and the city of Richmond.

The COURT.—Very well, let it go in.

Mr. WHITE.—I object upon the ground that it is immaterial, irrelevant and incompetent. It does not tend to prove any issues in this case; is not a contract binding on this defendant. Defendant is not a party to it; is in no wise bound by it.

(After discussion.)

The COURT.—That only bears upon the question of its navigability—whether it is a navigable stream or not. Whether it has ever been recorded or treated as such. I do not see any harm to this. Let the matter go in.

(Testimony of A. C. Faris.)

(Contract introduced in evidence. Marked Plaintiff's Exhibit C.)

Mr. WHITE.—Exception. (Assignment of Error No. 5.)

**Testimony of A. C. Chapman, for Plaintiffs.**

A. C. CHAPMAN, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I am city engineer and superintendent of streets. I know [71] where the dredger was located on the 15th of May. On the 15th of May, if I recall it, in the neighborhood of 10,000 yards of dredging had been taken out. It might have been 20,000 yards. I should say they were under one-half mile north of the north line of the Standard Oil holdings.

PLAINTIFF RESTS.

**Testimony of Thomas H. Rees, for Defendant.**

THOMAS H. REES, being first duly sworn as a witness on behalf of defendant and intervenor, testified as follows:

I reside in San Francisco. I am a Lieutenant-Colonel, Corps of Engineers of the U. S. Army in charge of the Government Engineers' Office in San Francisco. I have held that position about 4½ years. I am in local charge of the improvement of the water-ways around San Francisco Bay. There are some particular cases of improvements or works in navigable waters for which I issue permits by authority of the Secretary of War. (Witness is here shown document.) That is my signature; it was signed on the 21st day of July, 1914. I have seen

(Testimony of Thomas H. Rees.)

the body of water marked "South Channel San Pablo Canal" upon the map attached to the document and which I have identified. Permit issued by Thos. H. Rees, Lieutenant-Colonel Corps of Engineers to the city of Richmond to dredge the South Channel of the San Pablo Canal offered in evidence, marked "Defendant's Exhibit "A" for identification.) I have navigated the channel in question with a power boat, about 86 feet long, about 16 feet beam and drawing about 5 feet 9 inches to 6 feet. The channel I refer to is the one marked "C." I went up to a point where a dredge was lying and there was evidence that some dredger work had been done. The material from the dredge was piled up in banks and levees at the point where we stopped. It was quite near some of the works of the Standard Oil Company. There was a levee near [72] the line of the Standard Oil property. We went through the levee at the south side and went up what appeared to be a dredged channel from the higher ground to the west. We turned at the injunction from the main slough with the dredged channel. We went up just before high tide. The tide was still rising or flooding when we came out of the stream. While we were in the dredged channel a photograph was taken of my vessel. The name of the vessel was "The Suisun." That is the photograph of the boat we were on at the time. (Photograph introduced in evidence and marked "Defendant's Exhibit 2.") This is the channel (indicating channel "C" on the map) which I have testified to having navigated. We came into San Pablo



(Testimony of Thomas H. Rees.)

Bay, into the mouth of San Pablo Canal, and then into the south channel of San Pablo Canal. The south channel of San Pablo Canal is varying in width, some places not over 100 feet wide between the marsh land on either side and other places perhaps 200 feet or more. I had soundings taken as we came in and out. In this channel they ran generally 11 to 12 feet, sometimes up to 15 or 16. At one point there was a single sounding of 17 feet. There was evidence of this channel having been dredged out, only near the head of it. I observed the land on either side of channel "C" as shown on Plaintiffs' Exhibit 10. So far as I could see the immediate banks were covered with water. The salt marsh on either side so far as I could see was about a-wash. The water was just covering it generally. The grass was sticking up above the water. Some little distance away it was impossible to tell whether the ground was above water or whether it was only the grass. I saw no evidence of any obstructions or dikes. I made the trip on the 8th of December, 1915. This photograph marked Defendant's Exhibit "C," represents the locality at the head of the slough marked "C." It shows the dredged out and the spill-banks of dredged material and the dredger in the position [73] apparently where it was lying when I visited the place. The exposed place running out here (indicating) is the levee and this (indicating) is the marsh land. The channel runs from this side (indicating).

Cross-examination.

I went up San Pablo Canal at 11 o'clock in the

(Testimony of Thomas H. Rees.)

morning of December 8th. This was the only trip I made. I had soundings taken with a lead-line while going up and coming out. It was near at flood tide while we went in and out. This was the most favorable condition for going up there and coming out. I know nothing about the condition of the channel prior to that time. My boat drew about 6 feet of water. The sounding showed a slight variation in depth averaging from 11 to 12 feet, some deeper places were 15 or 16 feet and one place was some 7 feet in the channel. I do not know whether we were in the deepest channel or not. The depth was not less than 7 feet in the channel. Out in the flats in the bay when we were coming up we got 6 feet. My recollection is that the *predicated* tide in the tide tables for that tide was 6.8 feet. Within a quarter of a mile of the Standard Oil line the soundings, I think were not so deep as they were in other parts of the south channel of San Pablo Canal. They were deeper out farther as we went north. This channel is shown on the regular maps of the Coast and Geodetic Survey, but the maps do not indicate whether or not it is navigable. At a sharp point down toward the mouth of this channel toward the northerly end where a point makes out from the westerly side of the channel so that a boat would have to make a sharp turn there and get close to that point (indicating point on map attached to permit designated as Defendant's Exhibit "A" for identification) the sounding of 7 feet was taken. For a quarter of a mile or so going north from the line of the Standard

(Testimony of Thomas H. Rees.)

Oil property the soundings were more shallow than the deepest soundings farther north. [74] Some of the soundings further north were about the same as those in the portion between the Standard Oil and one mile north on the channel. The soundings for a quarter of a mile north of the Standard Oil line running from 10 to 12 feet generally with some deeper soundings up to 16 feet, with the exception of a sounding of 7 feet at a sharp point I mentioned. Defendant then introduced document marked Defendant's Exhibit "E," the same being headed "War Department, Office of Chief Engineers, Washington, June 30, 1914, General Orders, April 8th." Witness testified that before issuing this permit he received information concerning navigability of the channel from the city of Richmond, being furnished with the description of the channel and with a photograph showing a boat in the channel and at the head of the channel and that he believes information was furnished by the city attorney of the city of Richmond.

**Testimony of H. E. Aine, for Defendant.**

H. E. AINE, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am assistant chief engineer of the Standard Oil Company, have been for 14 years. I have been around Richmond for the last 40 years. I became familiar with these lands when I was about 16 years old. I have been on them quite frequently for the last 26 or 28 years. I have hunted upon these lands. I have been over the channels oftentimes in boats. The lands on the map, marked

(Testimony of H. E. Aine.)

"Plaintiffs' Exhibit 10" are absolutely salt marsh lands. I have known channel "C" marked on this map ever since I went around there. When I was a boy about 16 years old we used to go up and down there in duck boats. There was no commerce done on it that I know of, but we used to travel up and down that stream considerably with duck boats and flat boats. In 1907 I piloted a launch which brought up through this channel several loads of piling which [75] were delivered at the Standard Oil Company's property and brought in for use of the Standard Oil property. In 1914 I piloted up a barge and also a gasoline launch. Within a few days apart I piloted up the 'Petroleum No. 3' and stern-wheeler. I was partly the helper in bringing up Colonel Rees' boat on the trip that he testified to. There were some levees on shore, but if there were any levees put in there across the channel they were across before any time that I can remember of. I have seen signs of the levees on land. One right across here from the Standard Oil property (witness here marks on "Plaintiffs' Exhibit 10" cross marks at different points showing position of levee). This may not be precisely correct but it is in that general direction across here. The only thing that is left of the levee further north testified to here is a few posts still standing marked at this point. (Witness here marks with an X.) I am now marking in channel "C." But no time since I have been familiar with the conditions there has there been any obstruction on channel "C." I am familiar with the location of the Vulcan

(Testimony of H. E. Aine.)

Powder Plant (witness on direction of Court here marks on map the word "Vulcan"). I have never seen cattle grazing on any of these lands north of the line which I have drawn of the southerly levee line. Where the old road crosses here (indicating on map) was where the back-bone is between the main line and the Potrero and on either side of it for a considerable distance, say  $\frac{1}{4}$  or  $\frac{1}{2}$  mile, it is reasonably salt ground where grass may grow or cattle may range, but as you go north the further north you go the more you get into the marsh country, and it is impossible for anybody to walk on foot across there, much less cattle. That is during all seasons of the year. At low tide it is impossible to cross any of the mud sloughs. The mud naturally gets deeper as you go along there but at the Standard Oil property the mud down to the blue clay line is from 16 to 18 [76] feet. The Standard Oil Company has built quite a number of dikes. Their main dike shown on this map is on the black line. We also have another one within that one right across the property. We also have another one right up in here (indicating). The photograph now shown me marked Defendant's Exhibit "C" represents the steamer "Suisun" very close to the end of the channel "C" where it connects with the Standard Oil channel and runs to the main land. The Standard Oil channel is a dredged channel going up to the Belt Line and it ends on a city street. I don't know the name of the street. That comes behind the Standard Oil plant. By the Belt Line I mean the Richmond Belt Line Railway which begins



(Testimony of H. E. Aine.)

at the Standard Oil Refinery and runs to Winehaven. It connects with both the Southern Pacific and the Santa Fe. It runs past the Standard Oil property around to Winehaven. This dredged channel connecting with channel "C" ends about 100 feet from the Richmond Belt Line Railway. The Richmond Belt Line Railway appears in that picture (Defendant's Exhibit "C") in the foreground. This picture was taken on the 8th of December, the day of the visit of Colonel Rees. It correctly represents the condition of the land as to being covered with water at that time. I recognize the picture marked Defendant's Exhibit "B." I saw the picture taken. I observed the conditions in relation to the channel and the land there generally. The picture marked Plaintiffs' Exhibit "D" is a correct representation of the condition existing at the time when Colonel Rees' boat came in there. (Witness shown Defendant's Exhibit "D.") I locate channel "C" on this picture. The channel shows very plainly in the picture. There is a boat in the channel. I know the scow-schooner "Ada McKewen." She brought in a load of rock for us in March 1914 to the point where this creek, designated as "C," connects with our property. That is where our levee crosses the channel [77] "C." There were pictures taken before she came in. I was present when "Ada McKewen" came in and saw the photograph taken. I have been up the channel with the steamer "Petroleum" in March 1914. The channel had not been dredged out prior to the time these boats went up there. Channel "C" is levied

(Testimony of H. E. Aine.)

off at that point (showing). It was practically a marsh from there on. That was about the head end of the slough at that time. The reason we levied off the end of the slough was because we disposed of about 25 to 27 million gallons per day which we used for condensing purposes in the refinery and that water carries a certain percentage of oil waste. To save that oil and to keep it from going out into the bay, which is against the Fish Commissioners' rules, we have to separate that water and it is inside this levee that we separate the water from the oil. The picture which I have testified to correctly represents the steamer "Petroleum" as she laid at the time the picture was taken. (Photograph introduced in evidence marked Defendant's Exhibit "G." I know the craft known as the "Shasta." I was instrumental in piloting it into this channel (channel "C") to the terminal of the water-way, that is to a point within 100 feet of the Belt Line. I saw the photograph taken of the "Shasta" as she lay there. This was December 1915. She carried a cargo of 60 yards of crushed rock. (Photograph introduced in evidence and marked Defendant's Exhibit "H." I know about the depth of water in channel "C" at various points. Starting at a point where the Standard Oil levee is, from there on, at a zero tide, it starts in at about 4 feet, at least it did until it was dredged there, and ran along in here to a depth of about 8 feet at zero tide and at this point (indicating) it runs up to 12, to a height of about 16 feet at zero tide right at the entrance to the mouth of the channel. The channel

(Testimony of H. E. Aine.)

deepened as you went north; about midway of the [78] channel between the Standard Oil refinery and the mouth of the channel there was in the neighborhood of about 8 feet of water at low tide. At a point where the supposed levee crosses it the channel has a depth of something like 12 feet at low tide approximately. Zero tide is the Coast Survey tide, the point at which the tides are marked for their height. At ordinary high tide the lands in question are pretty well covered with water. All the sloughs leading into this main channel are pretty well filled up, some overflowing the banks. There are many flats there that are covered at almost every tide. This dredged channel terminates near the asphalt department of the Standard Oil plant. Asphalt is handled in barrels, mostly over the Belt Line at this time. This channel "C" could be used for any commercial purposes there.

#### Cross-examination.

The launch that towed the piling up there was a gasoline launch, a reasonably fair-sized boat. She drew about 5 feet of water. The "Ada McKewen" is a power scow boat. It drew about 5 feet loaded. The "Petroleum No. 3" is a stern-wheeler steamer. I took it up about two days after the other one on the flood tide. All boats went in and out on high tide. There were several boats came up after that. The "Ada McKewen" was bringing rock for the Standard Oil. The Standard Oil plant was started in 1901.

**Testimony of A. C. Faris, for Defendant (Recalled).**

A. C. FARIS, recalled for the defendant.

Identifies the original contract between the City of Richmond and the North American Dredging Company, wherein the North American Dredging Company agrees to dredge the south channel of the San Pablo Canal for the city of Richmond, in accordance with the plans and specifications attached to the contract for the sum of \$.1074 per cubic yard. Contract admitted read in evidence and original withdrawn. [79]

**Testimony of Fred Klesow, for Defendant.**

FRED KLESOW, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in San Francisco and am a master mariner, bay and river trade. I am in charge of the schooner "Shasta." I am familiar with the lands in question here, being the lands in the vicinity of the Standard Oil plant shown on Plaintiffs' Exhibit 10. I was on this land first about 1882, '83, '84. I navigated these streams with a vessel named the "Lookout" with about 50 tons. She was about 4 feet 9 draft. I am familiar with the markings on this map (Plaintiffs' Exhibit 10). I used to go up the stream called San Pablo Creek. I used to go up to the place called the Vulcan Powder Works. We were there once a week sometimes again once in three weeks and so on for three years. They called this San Pablo Creek. That is the stream marked on the map as "B." During these years I navigated

(Testimony of Fred Klesow.)

the stream marked "C." After the Vulcan Powder Works went out of business I came occasionally around here (showing) in bad weather. I have navigated this channel "C" this month. I brought up a load of rock for the Standard Oil Company, about 85 tons. I navigated with the schooner "Shasta." I had been in this channel before. I came into this one marked "C" with a big vessel lying outside. I went up in a small boat. It happened about once a year, in the fall and winter, right along every year since 1882. I did not at any of these times see any obstruction or levees across any of these bodies of water.

#### Cross-examination.

I never went up the stream "C" in a big boat in 1882. I would row up channel "C" about three miles from here (designating) 3 miles from the margin of the marsh land as shown on the map. Taking corners and everything into consideration, that channel is three miles. [80]

#### Testimony of Lewis Chamberlain, for Defendant.

LEWIS CHAMBERLAIN, being first duly sworn, as a witness for defendant and intervenor, testified as follows:

I reside in San Francisco. I am in the launch business. I own two boats. I went up the channel called "C" last April in a launch towing rock barges from the San Pablo Quarry here (pointing) to the Standard Oil Bulkhead. I made one trip in there before the dredger was in and one afterwards. The



(Testimony of Lewis Chamberlain.)

loaded barge drew five feet of water on both trips.

Cross-examination.

On both trips the tide was about four feet six. I had no difficulty getting up there either trip. I passed the dredger on the second trip where it lay about one-quarter of a mile from the Standard Oil Bulkhead. The barge in tow was about twenty-six feet wide and the dredger barge about thirty feet or more in width. I had no difficulty in passing the barge. I had no difficulty before I got into this waterway to reach the Standard Oil property except in the mud flats at beyond the end of the main slough. There was shallow water there. I probably got out of the channel. The wind was blowing strong and the boat small for that size of tow and the barge ran out of the channel and up on the mud flat. I am a mariner, licensed to navigate a launch. I do not know that water except by the chart. I have never had much experience there. I left the barge there one tide and went up into the slough and came back at the next turn of the tide and got the barge. I had no difficulty in navigating the slough except at one point where there was a little kind of bulkhead where a few boards were sticking up way up in here somewhere (indicating). It looked as though some obstruction had existed across the slough. [81]

**Testimony of Charles H. Lind, for Defendant.**

CHARLES H. LIND, being first duly sworn as a witness for defendant and intervenor, testified as follows:

(Testimony of Charles H. Lind.)

I live in Richmond. I am a photographer. I am familiar with the section of the country represented by map marked "Plaintiffs' Exhibit 10." I took photographs in the vicinity of that place in March, 1914. These photographs were taken at quite a high elevation south or west of the Standard Oil Asphalt plant, facing toward the channel. I took a series of photographs that day. These are the photographs marked Defendant's Exhibit "J." That vessel is the "Petroleum." I took the picture with the words "Ada McKewen" on. This vessel, at the time the picture was taken, was lying at anchor at the head of the channel, unloading rock there. On December 8th I took the photograph showing in the foreground Colonel Rees's boat "Suisun." These pictures correctly represent conditions there.

#### Cross-examination.

At the time I took these pictures, on the 7th or 8th of March, 1914, it was pretty close to high tide, and represents a series of pictures showing the "Petroleum" coming up.

#### **Testimony of W. Lindsey, for Defendant.**

W. LINDSEY, being first duly sworn, as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am a police judge and have lived in the vicinity of Richmond for thirty-three years, and am familiar with the locality shown on the map marked "Plaintiffs' Exhibit 10," and the various waterways and channels there shown on the map marked "Plaintiffs' Exhibit 10." I have

(Testimony of W. Lindsey.)

sailed and fished and hunted over these bodies of water in the locality and have been familiar with the locality as far back as forty years. There formerly was a levee, or the [82] marks of one that ran by the main channel, put in by somebody—I think it was Mr. Tewksbury—in early days. It came to the creeks and stopped and then went on again on the other side, on up the main channel. About sixteen years ago we rented a place for shooting and fishing and undertook to close that main slough and run dykes over across to Mr. Pierce's land, across to where the belt line is. We tried to put a solid dyke across the slough marked "C" on the map. We towed up with a gasoline boat and barge loaded with piles, and a pile-driver. We only cut off the channel for about forty-eight hours, when a heavy flood came in and broke over the dykes, or levees, that we built and the water got inside and broke our piles. We tried it a second time and failed again. I know of the existence of no other dykes except those across channel "C," other than the remains of the dyke close to the mouth of channel "C" where it is connected with the main slough. All this marsh is covered at what we call mid tide, that is, a small tide. It comes to the top of the land, but at high tide it covers the salt rice grass which grows about four feet high there. Channel "C" was great for fishing because the water there always had a depth of four or five feet at extreme high tide. I never saw cattle grazing along the channel "C." I

(Testimony of W. Lindsey.)

saw cattle toward the east feeding at times, only a short ways. This used to be the main channel where the freight warehouses all used to be in early days, but is all built up now. That is, the channel east of channel "B."

#### Cross-examination.

When we attempted to put in this dam, only fishing and hunting boats traveled on the slough. We took that slough particularly because it was deeper water. The dyke which we attempted to build was north of the Standard Oil Company's [83] holdings, near the Pierce land. Portions of it are still to be seen. We tried to enclose the upper portion of the stream for shooting purposes. According to the map the dyke appears to be at the head of the slough, but it is not. At that time the channel at "C" was not as wide above the Standard Oil property as down below, but navigable for small boats. The dyke was between three hundred and four hundred feet from where the dredger was lying.

#### **Testimony of E. J. Garrard, for Defendant.**

E. J. GARRARD, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside at Richmond, and have for 14 years past. I am mayor of the city of Richmond, and was a member of the city council of Richmond for the past 10 years. I am assistant engineer of the Standard Oil Company. I am familiar with the lands shown on the map "Plaintiffs' Exhibit 10," and also the channel "C." The black line represents the present

(Testimony of E. J. Garrard.)

properties of the Standard Oil Company. On March 9th, 1914, I saw the vessel "Ada McKewen" come up this channel at ordinary high tide. The land in the vicinity of channel "C" is about all covered. The grass sticks through the water. At low tide the land is bare water except in the sloughs and the creeks, as shown on the map. There are more or less distinct creeks. There is a public road at the head of this channel, known as Standard Avenue, formerly Road 26. It is forty feet wide and ends at the line of the Standard Oil Company.

#### Cross-examination.

The north line of the Standard Oil property cuts Road 26. The town of Richmond is north of the Santa Fe track. Point Richmond runs both south and north of the Santa Fe. There are people living a half mile to the south from the Santa Fe tracks, [84] that is as far as the settled portion runs. It runs south about 5 miles to the county line; nobody lives on the shaded portion. Standard Avenue, at the point where the Standard Oil property comes on the north, is about one-quarter of a mile east from the slough "C."

#### **Testimony of J. T. Carnahan, for Defendant.**

J. T. CARNAHAN, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am a transitman employed by the Richmond City Engineer. I made a preliminary survey of the channel marked "C," in



(Testimony of J. T. Carnahan.)

November, 1914, to plan the proposed dredging work. I found elevations at the bottom of the slough across at various points to make an estimate of the materials to be dredged. We took different elevations on the bottom of the slough with reference to the city base. Mr. Martin, from my notes which I took at the time, worked up the figures in the office for the plans and estimates. We took cross sections approximately every 30 feet. This map represents channel "C." The red line is the traverse line which I ran along the slough. The black line on the outer edge of the blue represents the shore line, or bank of the slough. The green lines on either side represent the bottom of the slope of the dredged bank. The yellow portion shows the part that is dredged. The dredged portion was to be 80 feet on the bottom and the length of the channel to be dredged was between 5,500 and 5,600 feet. The land is all within the city of Richmond. The map was admitted in evidence for the purpose of illustration.

#### Cross-examination.

I do not remember a dyke—I remember some timbering posts in the slough, but made no note of it. The brown line represents the zero line according to the city base. The idea was to get the elevation of the bottom of the channel, not the depth of [85] the water, in order to estimate the material to be dredged. The elevation of the bottom would give the depth of water too, but the depth is not shown on the map.

**Testimony of C. B. Martin, for Defendant.**

C. B. MARTIN, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am a draughtsman in the city engineer's office. I drew this map myself, marked Defendant's Exhibit "M," from notes produced by Mr. Carnahan. This map shows the course, direction, and width of bank, width of channel and proposed excavated portion of channel "C." The black lines at the southerly end of the map indicate the portion of the platted description of a deed between Mrs. Emily Tewksbury and the Richmond Belt Railway. A narrow strip running eastward for a mile across the marsh to the higher land and the portion crossing the channel is indicated on this map. The yellow portion indicates a width of 80 feet of the channel proposed to be excavated to the San Pablo Canal, according to cross-sections shown here. The outer black lines indicate the top of the bank of the channel. The maximum and minimum width varies from 100 feet to 200 feet. The dotted lines across the channel indicate where the cross-sections of the channel were taken. The cross-sections indicate the line of the bottom of the channel with reference to a level line at the top giving the height. The brown line which follows the whole course of the channel indicates the nought nought line or zero line or the base line from which all elevations are taken; that forms a contour which follows around the whole channel, both sides. The lines enclosing the yellow

(Testimony of C. B. Martin.)

strip are the actual width of 80 feet which it was proposed to dredge out. The lines at these angle points indicate the points where cross-sections were taken. I also marked in pencil [86] "place of old dyke"—I did not have the actual measurement, but it is about 300 feet to where this old dyke was built across at the north end. The figures along this red line give the distance and course by which they were located with reference to the section lines. These different course and directions are indicated on the map by sections, which means a distance of 100 feet, or a station. It is indicated on this line by stations. A station of 56 plus 91 means 5,611 feet from the point of beginning. The map was admitted in evidence for the purpose of illustrating the witness' testimony, and marked Defendant's Exhibit "M." This nought nought line begins at the south end of the channel on the Standard Oil dyke. The black line shows the ground line as it existed at that time—it represents the bottom of the slough. The red line shows the portion proposed to dig out. At the time the dredger stopped work it was about eight or nine hundred feet below the Standard Oil dyke. It was opposite cross-section 948. They had dredged from zero to a distance of 942 feet, starting at the upper or south end of the Standard Oil Dyke, and worked out toward the bay.

This cross-section was introduced in evidence for the purpose of illustration.

Cross-examination.

The platting of the cross-section lines just testi-

(Testimony of C. B. Martin.)

fied to was made merely as a draftsman and based upon figures furnished by Mr. Carnahan.

It was stipulated between counsel for plaintiffs and for defendant that the work of dredging was confined to the contract and plans and specifications, and that defendant has not and does not intend to dredge or do anything other than in accordance with said contract or the plans and specifications. [87]

**Testimony of C. Anderson, for Defendant.**

C. ANDERSON, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I am captain of the dredge that was going to do the dredging. I took the barge up the channel marked as channel "C" on the map marked "Plaintiffs' Exhibit 10." The barge with the spuds and everything high up draws about  $4\frac{1}{2}$  feet of water. The dredge is about 30 feet wide and 74 feet long. I took the dredge up to about 400 feet from the Standard Oil dyke.

**Cross-examination.**

I did not go up to the dyke because I wanted to start dredging that way so as to lay my pipe and save the work, and turn around on the same pipe. I went up at flood tide. It took about an hour from the outside of San Pablo Canal. I started from Oakland in the morning and got up on the flats outside of San Pablo Canal in the evening. It was dark and low tide. I stayed there until flood tide and then pulled her in with the launch. When the tide

(Testimony of C. Anderson.)

was very low the dredger was on the bottom of the slough. I dredged about eight or nine hundred feet of this channel when stopped. I took out about 22,000 cubic yards of dredging, according to my estimate. There was about two or three feet of water in the channel where the dredging was stopped at low tide.

**Testimony of J. T. Carnahan, for Defendant  
(Recalled).**

J. T. CARNAHAN, recalled for the defendant and intervenor, testified as follows:

The cross-sections testified to by Mr. Martin are drawn to scale. I have the original field-notes which indicate the distance from the red line shown on the plans at which these elevations are taken and show the distance above the zero line from which the depth of water could easily be computed. Without the aid of these notes, from the scaling the depth of water could be computed. [88]

**Testimony of C. B. Martin, for Defendant (Recalled).**

C. B. MARTIN, recalled for the defendant and intervenor, testified as follows:

The cross-section is drawn to a scale of 10 feet to the inch.

A copy of the permit from the Secretary of War to the city of Richmond to do the work of dredging in the south channel of San Pablo Canal, designated on Plaintiffs' Exhibit 10 as "C," was admitted in evidence, and marked Defendant's Exhibit "E."

Defendant then called the Court's attention to the



(Testimony of C. B. Martin.)

provisions of the charter of the city of Richmond and to the channel lines and Constitution of the State of California, of which the Court took judicial notice. Thereupon the case was submitted to the Court for decision. During the trial of the cause the Court, by consent and in company of counsel, made a personal view and inspection of the property involved in the cause, and of the premises, and of the slough marked "C" in Exhibit 10;

WHEREFORE, defendant and intervenor present the foregoing statement of the evidence produced at the hearing of said case, and pray that the same may be approved by the said Court as their statement of their case in order that the matters therein appearing may be of record in said action.

EARL D. WHITE,

Solicitor for Defendant.

D. J. HALL,

Solicitor for Intervenor.

The above and foregoing statement may be settled and allowed, November 21, 1916.

J. K. JOHNSON,

Solicitor for Plaintiffs.

The foregoing statement of the case is hereby settled, allowed and approved this 22d day of November, 1916.

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed Nov. 22, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [89]

[Title of Court and Cause.]

**Assignment of Errors.**

NOW COMES North American Dredging Company of Nevada, a corporation, defendant in the above-entitled cause, and city of Richmond, a municipal corporation, intervenor in said cause, and specify and assign the following as errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an interlocutory decree entered in the above-entitled cause in the above-named court on the first day of September, 1916, granting an injunction enjoining and restraining the defendant North American Dredging Company of Nevada, a corporation, and intervenor, city of Richmond, a municipal corporation, and their and each of their officers, agents, servants, employees and attorneys from cutting, dredging or excavating any ditch or canal or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs on file herein, and order and reference to the Master in Chancery for the purpose of ascertaining and reporting to the said court the loss and damage sustained by the said plaintiffs through the acts of said defendant and said intervenor, which said order was rendered and entered in the said District Court on the 1st day of September, 1916, as set forth in said interlocutory decree.

THAT said District Court of the United States in and for the Northern District of California, Second Division, erred as follows:

## I.

In adjudging and decreeing that defendant and intervenor and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, [90] or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs herein.

## II.

In ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to the Master in Chancery to hear testimony as to such loss and damage and to take an accounting thereof and to report the same together with his findings thereon to the Court.

## III.

In adjudging that plaintiffs have and recover their costs and disbursements in this suit.

## IV.

In overruling and not sustaining defendant's and intervenor's objection to the admission in evidence of a certain agreement between the city of Richmond, intervenor, and the Standard Oil Company, a corporation, dated March 30, 1915, wherein the city of Richmond agrees for the consideration of \$.1074 a cubic yard to deposit all material dredged from the lands described in plaintiffs' Amended Bill on the lands of the Standard Oil Company.

## V.

In sustaining and not overruling plaintiffs' objection to the following question asked by defendant

and intervenor to defendant's and intervenor's witness, H. E. Aine, as follows: Question: Are there any other bulkheads constructed where that dredging material could be placed so that it could not run back into the channel? Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulkhead behind which said dredging material could be placed. [91]

In order that the foregoing Assignment of Errors may be and appear of record the defendant and intervenor present the same to the Court and pray that such disposition may be made thereof as is in accordance with the laws of the United States made and provided.

WHEREFORE said defendant and intervenor pray that said interlocutory decree of September 1st, 1916, in said cause against the defendant and intervenor be reversed and that the Southern Division of the United States District Court, Northern District of California, Second Division, be directed to enter an order setting aside the said decree and that the defendant and intervenor have and recover of plaintiffs their costs and disbursements herein.

All of which is respectfully submitted.

EARL D. WHITE,  
Solicitor for Defendant.

D. J. HALL,  
Solicitor for Intervenor.

[Endorsed]: Filed Sep. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [92]

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[Title of Court and Cause.]

**Petition for Order Allowing an Appeal.**

North American Dredging Company of Nevada, a corporation, defendant above named, and city of Richmond, a municipal corporation, intervenor above named, conceiving themselves aggrieved by the interlocutory decree made and entered in the above-entitled cause in the above-named court on the first day of September, 1916, wherein and whereby it was ORDERED, ADJUDGED AND DECREED that the defendant, North American Dredging Company of Nevada, a corporation, and the intervenor, city of Richmond, a municipal corporation, and their and each of their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in said amended Bill of Complaint of plaintiffs on file, and wherein and whereby it was decreed that an accounting of the loss and damage suffered by plaintiffs, by reason of the acts of defendant and intervenor, be referred to the Master in Chancery of this court to ascertain and report an accounting to this Court of the loss and damage suffered by plaintiffs herein.

HEREBY petition said Court for an order allowing said defendant and said intervenor to prosecute an appeal from said interlocutory decree granting



said injunction and order an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor referred to in said interlocutory decree, to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided. Also that an order be made fixing the amount of security which the said defendant and the said intervenor shall give and furnish upon such [93] appeal.

And your petitioners will ever pray.

EARL D. WHITE,  
Solicitor for Defendant.

D. J. HALL,  
Solicitor for Intervenor.

[Endorsed]: Filed Sep. 29, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [94]

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[Title of Court and Cause.]

**Order Allowing Appeal.**

Upon motion of Earl D. White, Esq., solicitor for defendant, and D. J. Hall, Esq., solicitor for intervenor, and on filing the petition of defendant and intervenor, and the Assignment of Errors,

IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory decree made and entered on the 1st day of September, 1916, granting an injunction against defendant and intervenor herein and from an order of reference

to the Master in Chancery for the ascertainment and report of the damage sustained by plaintiffs.

AND IT IS FURTHER ORDERED that the amount of defendant's and intervenor's bond be and the same is hereby fixed at the sum of three thousand dollars (\$3000), the same to act as bond for costs on appeal, and that until the determination of the appeal herein, all further proceedings in the court below be stayed.

IT IS FURTHER ORDERED that a certified transcript of the record and proceedings be forthwith transmitted to the said United States Court of Appeals.

WM. C. VAN FLEET,  
District Judge.

[Endorsed]: Filed Sep. 30, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [95]  
31984-16.

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[Title of Court and Cause.]

**Undertaking on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, plaintiffs in the above-entitled action, in the full and just sum of three thousand dollars (\$3000), to be paid to the

said plaintiffs, their heirs and assigns, for which payment, well and truly to be made, the said United States Fidelity and Guaranty Company binds itself, its successors, and assigns firmly by these presents.

Sealed with the corporate seal and dated this 30th day of September, 1916.

The condition of the above obligation is such that whereas defendant and intervenor above named have taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse an order made and entered on the 1st day of September, 1916, by the District Court of the United States, in and for the Northern District of California, Second Division, in the above-entitled cause, granting an injunction restraining the defendant and intervenor and their officers, agents, servants, employees, and attorneys from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in plaintiffs' amended bill of complaint on file herein, and order of reference to the Master in Chancery for the purpose of ascertaining and reporting to the said Court the loss and damage sustained by plaintiffs through the acts of [96] defendant and intervenor.

NOW THEREFORE, the condition of the above obligation is such that if defendant and intervenor, above named, shall prosecute their said appeal to effect, and answer all costs and damages if they fail to make good their appeal, then this obligation shall

be void; otherwise to remain in full force and effect.

[Seal] UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

By BRADLEY CARR,  
Attorney in Fact.  
By H. V. D. JOHNS,  
Attorney in Fact.

State of California,  
City and County of San Francisco,—ss.

On this 30th day of September in the year one thousand nine hundred and 16, before me M. J. Cleveland, a notary public in and for the city and county of San Francisco, personally appeared H. V. D. Johns and Bradley Carr, known to me to be the persons whose names are subscribed to the within instrument as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Seal] M. J. CLEVELAND,  
Notary Public in and for the City and County of San  
Francisco, State of California.

Approved September 30, 1916.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Sep. 30, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [97]

[Title of Court and Cause.]

**Praeceptum for Transcript of Record.**

To the Clerk of said Court:

The above-entitled court having rendered in the above-entitled cause an interlocutory decree on the first day of September, 1916, and the said North American Dredging Company of Nevada, a corporation, defendant above named, and the city of Richmond, a municipal corporation, intervenor above named, having appealed from said decree to the United States Circuit Court of Appeals, Ninth Circuit,

You are hereby requested to make up as and for the record to be issued in and upon the said appeal the following:

Amended Bill of Complaint for injunction and damages.

Answer of defendant North American Dredging Company of Nevada.

Bill in intervention of city of Richmond, intervenor.

Answer of plaintiffs to Bill in Intervention.

Subpoena ad Respondendum.

Opinion of Court.

Interlocutory decree granting injunction and ordering reference to Master in Chancery for ascertainment of loss and damages.

Petition for order allowing appeal.

Assignment of Errors.

Order Allowing Appeal.



Undertaking on Appeal.

Citation.

A statement of the evidence introduced by and on behalf of the respective parties upon the trial in the above-entitled court of the above-entitled action with the documentary evidence and exhibits offered and received in evidence in the above-entitled [98] cause.

EARL D. WHITE,

Attorney for Defendant.

D. J. HALL,

Attorney for Intervenor.

Receipt of copy of the above Praecept is hereby admitted this 3d day of October, 1916.

J. K. JOHNSON,

Solicitor for Plaintiffs.

[Endorsed]: Filed Oct. 3, 1916. Walter B. Maling,  
Clerk. [99]

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*In the Southern Division of the United States District Court for the Northern District of California, Second Division.*

No. 184—EQUITY.

LUCIO M. MINTZER et al., etc.,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY OF  
NEVADA, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing ninety-nine (99) pages, numbered from 1 to 99, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$60; that said amount was paid by defendant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the *said* of said District Court this 3d day of January, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [100]

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**Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Lucio M. Mintzer, and Mauricia T. Mintzer, as Executor and Executrix of the Last Will and Testament of William Mintzer, Deceased, GREETING:  
You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein North American Dredging Company of Nevada, a corporation, and City of Richmond, a municipal corporation, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 30th day of September, A. D. 1916.

WM. C. VAN FLEET,  
United States District Judge.

Receipt of a copy thereof is hereby admitted this 3d day of October, 1916.

J. K. JOHNSON,  
Solicitor for Plaintiffs and Appellees.

[Endorsed]: No. 184—In Equity. In the Southern Division of the United States District Court for the Northern District of California, Second Division. North American Dredging Company of Nevada et al., Appellants, vs. Lucio M. Mintzer and Mauricia T. Mintzer, etc., Appellees. Citation on Appeal. Filed Oct. 3, 1916. Walter B. Maling, Clerk. [101]

[Endorsed]: No. 2913. United States Circuit Court of Appeals for the Ninth Circuit. North American Dredging Company of Nevada, a Corporation, and City of Richmond, a Municipal Corporation, Appellees, vs. Lucio M. Mintzer and Mauricia T. Mintzer, as Executor and Executrix of the Last Will and Testament of William Mintzer, Deceased, Appellees. Transcript of the Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 5, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*United States Circuit Court of Appeals for the Ninth  
Circuit.*

NORTH AMERICAN DREDGING COMPANY OF  
NEVADA, a Corporation, and CITY OF  
RICHMOND, a Municipal Corporation,  
Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINT-  
ZER, as Executor, etc.

**Order Extending Time to and Including November  
30, 1916, to File Record and Docket Cause.**

Good cause appearing therefor, it is hereby or-

dered that the appellants may have to and including November 30, 1916, in which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 30, 1916.

WM. W. MORROW,  
Judge, United States Circuit Court of Appeals,  
Ninth Judicial Circuit.

[Endorsed]: Order Under Rule 16 Enlarging Time to Nov. 30, 1916, to File Record Thereof and to Docket Case. Filed Oct. 30, 1916. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

NORTH AMERICAN DREDGING COMPANY OF  
NEVADA, a Corporation, and CITY OF  
RICHMOND, a Municipal Corporation,  
Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Appellees.

**Order Extending Time to and Including December 30, 1916, to File Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered that the appellants may have to and including December 30, 1916, in which to file the record and



docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, November 29, 1916.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to — to File Record Thereof and to Docket Case. Filed Nov. 29, 1916. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

NORTH AMERICAN DREDGING COMPANY OF  
NEVADA, a Corporation, and CITY OF  
RICHMOND, a Municipal Corporation,  
Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor, etc.,

Appellees.

**Order Extending Time to and Including January 5, 1917, to File Record and Docket Cause.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellants may have to and including January 5, 1917, in which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

WM. C. VAN FLEET,  
United States District Judge.

December 29, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to January 5, 1917, to File Record Thereof and to Docket Case. Filed Dec. 29, 1916. F. D. Monekton, Clerk.

No. 2913. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to January 5th, 1917, to File Record Thereof and to Docket Case. Refiled Jan. 5, 1917. F. D. Monekton, Clerk.